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No.: _____

IN THE

Supreme Court of the United States

October Term, 1983

RICHARD MASTRANGELO,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Petition

Questions Presented

1. Whether a finding that a criminal defendant has waived his Sixth Amendment right to confrontation can be based merely upon a showing of bare knowledge of a plot to make a witness unavailable coupled with a failure to warn appropriate authorities?

2. Whether this Court should resolve a split among the Circuit Courts of Appeals over whether the appropriate burden of proof for the government in establishing that a defendant has waived his confrontation rights should be preponderance of the evidence or clear and convincing evidence?

List of Parties

The trial and conviction from which petitioner now appeals involved no other parties. However, at an earlier trial in this case, which ended in a mistrial, petitioner was tried with co-defendant Joseph Dazzo.

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October Term, 1983

RICHARD MASTRANGELO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Richard Mastrangelo, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction entered against petitioner by the United States District Court for the Eastern District of New York (McLaughlin, J.).

OPINIONS BELOW

The opinions of the Court of Appeals appear in the appendix hereto at pp. 1a-4a, 26a-34a, 41a-60a. The opinions of the trial court appear in the appendix at pp. 5a-25a, 35a-40a.

JURISDICTION

The date of the judgment of the United States Court of Appeals for the Second Circuit was November 4, 1983. A Timely Petition for Rehearing was denied on December 19, 1983. The court's jurisdiction is invoked under Title 28, United States Code, §1254(1)

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.

STATEMENT OF THE CASE

This case raises an issue of fundamental importance to the vitality of the Sixth Amendment. For although the evidence unequivocally established that petitioner Richard Mastrangelo had absolutely no involvement in the murder of a government witness, the Second Circuit held that he had waived his right to complain of the admission of the murdered witness' grand jury testimony. The court held that a finding of a waiver need only be supported by a showing that a defendant had "bare knowledge" of a plot to kill a government witness and then failed to warn the appropriate authorities. Moreover, the court held that this showing of bare knowledge need only be supported by a preponderance of the evidence. In so holding, the court expanded the Sixth Amendment waiver doctrine beyond its previously recognized limits and, at the same time, placed itself in direct conflict with the Fifth Circuit Court of Appeals, which has adopted a "clear and convincing" evidence test. Accordingly, this is a case that cries out for review by the Supreme Court.[1]

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[1] Indeed, the Second Circuit's actions in this case bespeak its view that this case is worthy of Supreme Court review. First, by asking the trial court to make findings under two different standards of proof, it virtually invited review by this Court. Second, it took the extraordinary step of granting bail, pending a determination on this petition, to a defendant sentenced to *nine* years in prison. Surely, petitioner's present liberty is strong evidence of the seriousness with which the Court of Appeals views this case.

Procedural History

In April of 1981, petitioner and a co-defendant were tried on charges of conspiracy to import and to possess with intent to distribute marijuana (21 U.S.C. §846(1)); possession with intent to distribute marijuana and methaqualone (21 U.S.C. §841(a)(1)); and importation of marijuana and methaqualone (21 U.S.C. §§952(a) and 960). These proceedings resulted in a mistrial as to Mastrangelo, declared over defense objection, after the murder of James Bennett, the government's only witness against him. The Second Circuit affirmed the trial court's finding of manifest necessity and ordered that Mastrangelo be retried.

In March of 1982, a jury convicted Mastrangelo of the above charges and, in addition, the charge of obstructing justice 18 U.S.C. §1503 (1976). The grand jury testimony of the murdered witness was introduced at this trial over defense counsel's objection. As a result of this conviction, Mastrangelo was sentenced to a total of nine years in prison, followed by a special parole term of ten years, and $20,000 in fines.

On appeal, the Second Circuit remanded for evidentiary hearings on the issue of whether Mastrangelo effectively waived his Sixth Amendment confrontation right and hearsay objection through involvement in the murder of Bennett. The Court of Appeals directed that evidence of Mastrangelo's complicity in the murder should be determined under the "preponderance of the evidence" standard of proof. However, evincing an uncertainty about which standard of proof should apply, the court also directed the trial court to make findings under the clear and convincing evidence standard. The court further stated that "bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities is sufficient to constitute a waiver." (34a)

On remand, the trial court found that Mastrangelo had not been in any way involved in the murder but did have "bare knowledge" that it would occur. It also held that this latter conclusion was supported only by a preponderance of the evidence and not by clear and con-

vincing evidence. The Second Circuit affirmed the trial court's finding and upheld petitioner's conviction.

The Evidence at Trial

The peculiar procedural posture of this case obviates the needs for a discussion of what occurred at trial. That is, since the issues raised in this petition relate only to whether petitioner waived his right to confrontation through knowledge of the plan to kill James Bennett, the evidence at trial, with the exception of the fact that James Bennett's grand jury testimony was admitted into evidence, is irrelevant. Accordingly, due to the page limitations imposed by Supreme Court Rule 21.4, it will not be discussed. Should the Court require more information about the facts of this case, they are amply set out in the opinions contained in the appendix to this petition.

The Initial Appeal of Petitioner's Conviction

On appeal of his conviction, petitioner argued that Bennett's grand jury testimony was inadmissible under both Fed.R.Evid. 804(b)(5) and the Sixth Amendment's Confrontation Clause. The Second Circuit, hoping "to avoid resolution of the[se] difficult...issues", (31a), remanded for an evidentiary hearing to determine if Mastrangelo had been involved in Bennett's murder and had thereby waived his right of confrontation. As noted, the Court of Appeals directed that evidence of Mastrangelo's complicity in the murder should be determined under the "preponderance of the evidence" standard of proof, with an additional finding to be made under the clear and convincing evidence standard. The court further instructed:

> If the District Court finds that Mastrangelo was in fact involved in the death of Bennett through knowledge, complicity, planning or in any other way, it must hold his objections to the use of Bennett's testimony waived. *Bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities is sufficient to constitute a waiver.*
> (34a emphasis supplied).

The Post-Remand Hearing

The government's first witness at the hearing was Joseph Bennett, a participant in the federal witness protection program (H 21),[2] who has a long criminal history.[3] Bennett, who was the nephew of the murdered witness, James Bennett (H 36), testified that he had met Mastrangelo in late 1975. (H 32) Since then, they had engaged in some 12 to 15 drug transactions. (H 41)

In January, 1978, Mastrangelo supposedly asked Bennett if he would be interested in unloading a large marijuana shipment, for which he could earn about $10,000. (H 42-43) Bennett refused because "I had jumped bail again and I really didn't want to get involved in it." (H 43) Some months later, though, Mastrangelo made the same offer. (H 44) Bennett again refused for the same reasons. (H 44) Finally, in November, 1978, the offer was made and refused for a third time. (H 45)

Shortly after that last conversation, Bennett learned that there had been a large seizure of marijuana

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[2] The letter "H" refers to the transcript of the post-remand hearing.

[3] According to Bennett, his first felony conviction, in 1972 or 1973, was a New York State charge of possession of forged instruments. (H 21) He received probation for that crime but then violated that probation when he was convicted of possession of stolen property in Suffolk County. (H 22) As a result of that conviction, he was resentenced to four years imprisonment on the possession of forged instruments charge (H 22) anD received a concurrent three year sentence for the possession of stolen property conviction. (H 22) Subsequently, in November, 1979, he pleaded guilty to a 1977 Ulster County, New York, charge of assault and robbery. For this crime, he received a sentence of eight and a half to 17 years imprisonment. (H 24)Presently, Bennett is also serving three concurrent one and a half to three year New York State sentences for possession of forged instruments and bail jumping. (H 24) He has also pleaded guilty to an Orange County, New York, charge of possession of stolen property. Finally, this laundry list of crime concludes with Bennett's recent guilty plea to federal charges of theft and resale of stolen vehicles (H 26), for which he received a concurrent one year sentence.

in the Jamaica Bay area of Queens.[4] (H 46) Based on this information, he concluded "[t]hat Richie lost a lot of grass." (H 46) Thereafter, Mastrangelo called and asked Bennett if he had heard "what happened". (H 46) The two men agreed to meet at a bar in Newburgh, New York, where Mastrangelo "told me that I should probably stay away from the area. It would be real hot." (H 47)

It was not until a few months later that Bennett saw Mastrangelo again. Responding to a telephone call from him (H 47), Bennett met Mastrangelo at the "Canarsie Bar" in Brooklyn. (H 48) At this meeting, Mastrangelo reportedly asked Bennett "if it was possible for me to speak to my uncle Jimmy, to try to prevent him from testifying and hurting Richie with any testimony he might give to a Grand Jury." (H 49) Bennett refused this request because his uncle was a "legitimate guy", suggesting that Mastrangelo instead offer James Bennett a $100,000 bribe. (H 49-50) In response, Mastrangelo supposedly said "that I [Joseph Bennett] shouldn't be concerned about it. That he'd make sure that he [James Bennett] never testified against him." (H 50)[5]

The second and final government witness was Nicholas Berardi, also a participant in the witness protection program (H 21) with a long criminal history.[6] His involvement with Mastrangelo began in August, 1981, while they were both imprisoned at the Metropolitan Correctional Center in New York. (H 214) The two men

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[4] On November 11, 1978, federal officials interrupted the offloading of the boat, "Terry's Dream". (43a)

[5] The witness rephrased this crucial part of his testimony a number of times. (H 50-52) His general view of the conversation, though, was that Mastrangelo "wouldn't stand for my uncle testifying against him, that that wouldn't happen." (H 51)

[6] Berardi's prior criminal record began in 1956, when he was convicted of a New York State narcotics offense and received five to six years imprisonment. (H 211) In 1969, he was sentenced on a Nassau County robbery charge to five to nine years imprisonment. (H 211) In 1981, he received a ten year sentence for extortion, in the Southern District of New York. (H 211) Finally, in 1982, he received a four to eight year sentence, to run consecutive to his ten year sentence, on a New York State manslaughter charge. (H 211-12)

apparently became friends and, although Mastrangelo was "pretty closed-mouthed", talked on a regular basis. (H 215)

The crucial part of Berardi's testimony related to a conversation he supposedly had with Mastrangelo in November, 1981. (H 253) Yet, Berardi's testimony about this conversation was incredibly obscure, if not altogether incomprehensible. Apparently, after Mastrangelo had lost his appeal of Judge Weinstein's denial of his double jeopardy motion, Berardi "mentioned something, you know, his friends, just, I don't talk, that his friends are doing no favor by whacking out this guy on the day of his trial." (H 223) According to Berardi's first account of this conversation, Mastrangelo supposedly answered that "he [Mastrangelo] had no choice, no alternative and it had to be done, a phone call was made and it had to be done." (H 223) However, almost immediately, Berardi began to waffle as to Mastrangelo's use of pronouns. That is, he was unsure whether it was "he", "we" or "they" who had "no choice". (H 223, 290, 293)

On cross-examination, the substance of Berardi's testimony became even more unclear, for he admitted that, in a February 26, 1982, interview with Assistant United States Attorney Walter Mack, he had told Mack, in substance, that Mastrangelo did not know about the murder prior to its occurrence. (H 431) Further, Berardi admitted that the "we got the phone call" statement had initially been made *to Mastrangelo* in response to Mastrangelo's complaints about the timing of the murder. (H 432)

Following this last revelation, Berardi became even more difficult to understand. In an attempt to "clarify" his testimony, Berardi stated that Mastrangelo "didn't know who did the murder." (H 433) When the witness was asked for further explanation, though, his response was cryptic: "I'll stick to my statement." (H 433) Continuing, he stated: "My feelings? He don't know who did the killing." (H 424) He further admitted that everything he knew about Mastrangelo and the murder was based on "talk". (H 434)

The rest of Berardi's testimony, elicited by both counsel and the court, did little to help matters. While Berardi finally and unequivocally stated that (1) the telephone call at issue was made to find our where the murdered witness Bennett could be found (H 439); (2) Mastrangelo was not a party to that telephone call (H 440); and (3) he did not believe that Mastrangelo knew who actually shot Bennett (H 442-44), he never gave an unequivocal answer to the crucial questions of what Mastrangelo knew and when he knew it.

Berardi did state twice that, in his opinion, Mastrangelo knew, prior to the incident, that Bennett was going to be murdered. (H 444) But he adamantly refused to articulate the grounds for this belief. On recross-examination, the witness instead stated that his testimony about Mastrangelo's knowledge of the murder was a mere "feeling", based upon "common sense." (H 445) Indeed, Berardi stated that Mastrangelo never confessed that he was a participant or had knowledge in the murder of James Bennett. (H 445-46)

Thus, as the District Court's questioning of Berardi makes clear, the witness' testimony did little to resolve the issues to be decided at the hearing.

> The Court: The critical questions, did he know that it would happen? and you've said "yes" to that several times. But in answer to Mr. Shargel, you said yes, in my opinion, I imagine it, I speculate it, as common sense. In answer to Mr. Muller's question you said it's based on what Mr. Mastrangelo told me.
>
> The Witness: Many conversations.
>
> The Court: That's the area that's gray and it's got to be cleared up if this issue is to be settled.
>
> What is in Mr. Mastrangelo's conversation with you that leads you to believe he knew the witness would be killed?

The Witness: He knew that it was – I would put it he knew that the guy was going to get whacked out.

The Court: How did he know it? How do you know he –

The Witness: Talk – I am giving – that's the only thing I could do, give you my feeling based on conversations with him.

The Court: You say "based on conversations." You must tell me, if you can, what –

The Witness: A period of four months, your Honor, with this guy, 17 hours a day.[7]

The Court: What did he say to you? What did he say to you that would support your –

The Witness: I am sticking to my statement of November.

The Court: I'm sorry?

The Witness: I'm sticking to my statement of what he told me in November. Phone call was made and the guy had to get whacked out.

The Court: Is that the sole source of your conclusion?

The Witness: Yes, yes. I have to stick with that.

(H 447-48)

Following Berardi, Walter Mack, an Assistant United States Attorney in the Souther District of New York, was called as a defense witness. The purpose of Mack's testimony was to clarify the significance of a draft account of Berardi's February 26, 1982, interview with Mack. (Defense Exhibit C) That report stated, in relevant part:

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[7] Clearly, Berardi's general conversations with Mastrangelo over a period of four months did not play a part in his conclusions about Mastrangelo's involvement in the murder. By Berardi's own admission, Mastrangelo was "closed-mouthed" (H 215) and the November conversation was the only one in which the murder was discussed. (H 448)

> From conversations with Mastrangelo, source [Berardi] believes that Frankie (LNU), Mastrangelo's partner, and Tony Stabile were responsible [for Bennett's murder]. Mastrangelo did not know the murder was going to occur, or who actually did it; however it is clear that he was the beneficiary. Bennett was apparently on a family visit to his sister's house. He had refused protection. Somebody made a call, *probably his brother-in-law*. Mastrangelo was told, in response to his complaints about the timing of the murder, that "we only got the call that morning" as to his whereabouts, and that we didn't know where he was until then!
>
> He could provide no additional information at this time.

In Mack's view, the agent's report of the February 26th interview was somewhat inaccurate. (H 466) Rather, according to Mack, the gist of Berardi's information was that:

> [T]here was one or two perhaps two conversations in which Richard [Mastrangelo] in a sense indicated or admitted that the murder had to be done, that was the only way it could be handled and that – I don't think that Nicky ever said to me that Richard admitted who did it, but that the organization had had it done, that people who were in the organization of which Richard is a party that had the homicide done and that Richard had some knowledge that there was a telephone call or something had happened in which this witness' whereabouts was revealed to the organization prior to the day he testified.

(H 475) In other words, "the gist of what happened, [was] that there was an organization of which Richard was a part that basically had this witness murdered." (H 475)

The last evidence submitted was a stipulation entered into by the government and counsel for Mastrangelo concerning the expected testimony of the government agent who had been present at the February 26, 1982, meeting between Walter Mack and Nicholas Berardi. The first part of that stipulation dealt with Berardi's claim that, immediately after his "phone call" conversation with Mastrangelo, he contacted the agent and related to him the substance of that conversation. (H 297, 423, 449) According to the agent, however, Berardi mentioned Mastrangelo only once to him prior to the February meeting with Mack. In October, 1981, Berardi called him and, speaking in "catch phrases, buzz words and incomplete sentences" (H 517), mentioned someone with the last name that began with "Mastro". (H 518) However, the agent did not hear the first name or the full last name. (H 518) Rather, the February 26th meeting was the "first time the agent recalls hearing the name Richard Mastrangelo." (H 519)

The second part of the stipulation dealt with the report that the agent prepared about the meeting between Mack and Berardi. According to the agent, the part of his report that stated that "Mastrangelo did not know the murder was going to occur...." meant that Mastrangelo did not know the details of the murder, and did not know it would occur precisely when it did." As for the more crucial issue, the agent did not "recall if Berardi believes Mastrangelo had prior knowledge that the witness would be killed." (H 519)

The District Court's Decision Upon Remand

In evaluating this evidence, Judge McLaughlin made clear that there was no proof at all to suggest that Mastrangelo had any *involvement* in the murder of James Bennett. Rather, the evidence at the hearing was directed solely towards showing that Mastrangelo knew in advance that Bennett would be murdered. Thus, Judge McLaughlin held: "I find that the government has established by a preponderance of credible evidence

that Mastrangelo had prior knowledge of a plot to murder James Bennett and failed to warn the appropriate authorities. I find, however, that the government has not established Mastrangelo's prior knowledge of the murder plot by 'clear and convincing' evidence." (7a)

The Post Hearing Appeal

On the appeal after remand, Mastrangelo argued (1) that a finding of waiver cannot be based upon a showing of "bare knowledge" coupled with a failure to warn authorities and (2) that a defendant's right to confrontation should be deemed waived only upon proof by "clear and convincing" evidence of his complicity in a witness' unavailability. The Second Circuit, with virtually no explanation, affirmed the opinion of the District Court. (2a)

REASONS FOR GRANTING THE WRIT

The court below erroneously permitted the admission of Bennett's grand jury testimony even though petitioner was in no way responsible for the unavailability of this witness. Moreover, the court conditioned waiver only upon proof by a mere preponderance of the evidence that Mastrangelo had knowledge of a plot to kill Bennett. Where the inherent reliability of evidence is at issue, as in the instant case, the correct waiver standard should be proof by 'clear and convincing evidence.'

I

A Finding Of Waiver Cannot Be Based Merely Upon A Showing Of Bare Knowledge Coupled With A Failure To Warn Appropriate Authorities.

When the Second Circuit held that "[b]are knowledge of a plot to kill Bennett and a failure to give warning to the appropriate authorities is sufficient to constitute a waiver [of Mastrangelo's confrontation rights]" (34a), it drastically expanded the doctrine of waiver

and, erroneously denegrated the significance of the Sixth Amendment's Confrontation Clause.[8] The right to confrontation is a fundamental constitutional right and "for a waiver to be effective it must clearly be established that there was an intentional relinquishment or abandonment of [it]." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (*quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *accord, Barber v. Page*, 390 U.S. 719, 725 (1968). Thus, other courts which have considered the issue of waiver have insisted upon a showing that a defendant took affirmative steps to prevent a witness from testifying. *See, e.g., Steele v. Taylor*, 684 F.2d 1193, *cert. denied sub nom. Kilbane v. Marshall*, ___ U.S. ___, 103 S.Ct. 1501 (1983) (defendants wrongfully convinced witness not to testify against them); *United States v. Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied sub nom. Evans v. United States*, 456 U.S. 1008 (1982) (defendant himself shown to be responsible for the murder of a government witness); *Black v. Woods*, 651 F.2d 528 (8th Cir.), *cert. denied*, 454 U.S. 847 (1981) (defendant threatened and attempted to intimidate government witness); *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980) (defendant had threatened the life of a witness); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977) (defendant had threatened witness).

In the present case, however, Mastrangelo was never shown to have taken part in the murder of Bennett. This was made clear by Judge McLaughlin's findings in the evidentiary hearing below. Moreover, nearly four years after Bennett's murder there has been no additional evidence beyond these findings, much less an indictment, suggesting that Mastrangelo was involved in the killing. Since it has never been shown that Mastrangelo was responsible for this witness' unavail-

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[8] For the purposes of this petition, the issue of waiver will be discussed in a Sixth Amendment context. However, these same arguments also apply to the finding that Mastrangelo waived his claim that James Bennett's testimony was, in addition, inadmissible under Fed.R.Evid. 804(b)(5).

ability it should not be presumed that he has waived his confrontation right under the Sixth Amendment.

Prior to the Second Circuit's decision in *Mastrangelo*, the law had been crystal clear that a waiver of one's confrontation rights took place only where a witness was "made unavailable by the *wrongful conduct*" of a defendant. *Steele v. Taylor, supra*, 684 F.2d at 1202 (emphasis supplied). Now, though, the court has expanded the scope of the waiver doctrine to encompass situations where the defendant has not even acted wrongly under the law. Assuming, as we must, that a preponderance of the evidence showed that Mastrangelo had bare knowledge of the plot to kill Bennett, he committed no crime by failing to report it. Nor did he have any common law duty to give an appropriate warning. Thus, in a legal sense, Mastrangelo did not act improperly, for he had no legal obligation to tell anyone about a plan to murder James Bennett. It would therefore be improper and unfair to find a "waiver" on his part based upon his failure to take actions that the law in no way required him to take.

Surely, Mastrangelo violated no statute by failing to inform authorities about a plot to kill James Bennett. The only conceivably applicable crime in this situation would be misprision of a felony, 18 U.S.C. §4. Yet, the law is clear that "[m]ere silence, without some affirmative act, is insufficient" to sustain a conviction for this crime, *Lancey v. United States*, 356 F.2d 407, 410 (9th Cir.) *cert. denied*, 385 U.S. 922 (1966). Because "there is no obligation to notify civil authorities" about the commission of a crime, *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977), the government, in a misprision case, is required to show "that a felony was committed, that [the defendant] had knowledge of the felony, that he failed to notify authorities, *and that he took an affirmative step to conceal the crime.*" *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1983) (Emphasis supplied). Here, of course, there was absolutely no evidence to even suggest that Mastrangelo took any steps to conceal the crime at issue. Rather, at most, the proof showed only that he took no active steps to alert the proper authorities. On these facts, it is ob-

vious that no crime was committed. *See also Neal v. United States*, 102 F.2d 643 (8th Cir. 1939).

Nor, as noted, can it be said that Mastrangelo had any other variety of duty, imposed by law, to report knowledge of the plan to kill Bennett. "In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction... Hence there arose very early a difference, still deeply rooted in the law of negligence, between 'misfeasance' and 'nonfeasance' - that is to say, between acts of misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm." Prosser, *Torts* (4th Ed.), §56 at 338-39.

> The significance of the foregoing distinction is that whereas a cause of action generally arises in favor of a party injured through another's misfeasance, no such action lies to recover for injuries sustained as a result of nonfeasance. *This is simply a corollary of the principal that everyone is obligated to so conduct himself so as not to create an unreasonable risk of harm to others, and yet no one is obliged to assist one who is injured by another or himself.*

Farwell v. Keaton, 51 Mich.App. 585, 589-90 (1974), *rev'd on other grounds*, 396 Mich. 281, 290 N.W.2d 217 (1976); *see, e.g., Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959) (no civil liability arising out of a death by drowning even though the defendant had urged and taunted the deceased to jump into a body of water and then failed to go to the deceased's rescue as he was drowning.) Here, assuming that Mastrangelo did know of the plan to kill Bennett, his actions, or lack of them, can only be characterized as "nonfeasance". He owed no duty to James Bennett, having no special relationship with him from which a duty might have arisen. *See, e.g., Yu v. New York, New Haven and Hartford Railroad Company*, 145 Conn. 451, 144 A.2d 56 (1958) (a carrier owes a duty of care to a passenger); Restatement, Second, Torts §315. Thus, while his failure to act may not have been morally commendable, it was in no way subject to condemnation by the law.

Ultimately, then, since it is clear that Mastrangelo had no legal obligation to warn of the plan to kill Bennett, the Second Circuit's expansion of the waiver doctrine is at odds with the principle underlying it. "The rule [concerning waiver]...is based on a public policy protecting the integrity of the adversary process by *deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness.*" *Steele v. Taylor, supra*, 684 F.2d at 1202 (emphasis supplied). Put another way, "when confrontation becomes impossible due to the actions of the very person who would assert the right, logic dictates that the right has been waived." *United States v. Thevis, supra*, 665 F.2d at 630 (emphasis supplied). Yet, here, the evidence showed that Mastrangelo did absolutely nothing that prevented Bennett from testifying. Thus, to find a waiver under these circumstances, would amount to an unprecedented and ill-advised alteration of the law.

II

There Exists A Conflict Among The Circuits On The Burden Of Proof By Which A Defendant Is Deemed To Have Waived His Confrontation Right.

While the Second Circuit panel that remanded the case recognized that "the clear and convincing test may well apply to issues of admissibility arising under [the confrontation clause]", it nonetheless directed the District Court to apply a preponderance of the evidence test. (34a) As if to highlight its own uncertainty as to the appropriate test, though, the court further ordered that, in the interest of expediting any further proceedings, the trial judge make findings under the clear and convincing standard as well. Indeed, Judge Oakes stated in a concurring opinion that "...because I remain in doubt as to the appropriate burden of proof in respect to waiver in this case, in prudence I will await the findings of the court below on remand." (34a)

As noted, the trial court concluded that proof of Mastrangelo's bare knowledge of the plot to kill James

Bennett had been established *only* by a preponderance of the evidence. (7a) The affirmance of this ruling by the Second Circuit, clearly adopting a preponderance standard, thus creates a direct conflict with the view of the Fifth Circuit on this issue. In *United States v. Thevis*, 665 F.2d 616 (5th Cir.), *cert. denied sub. nom. Evans v. United States*, 456 U.S. 1008 (1982), the court held that a finding of waiver can be supported only by *clear and convincing* evidence that a defendant is responsible for a witness' unavailability. *Accord, Holtzman v. Hellenbrand*, 92 A.D.2d 405, 415, 460 N.Y.S.2d 591, 597 (2d Dept. 1983). In contrast, both the Sixth and the Tenth Circuits have agreed with the Second Circuit that a preponderance test should apply. *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1501 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *cert. denied*, 449 U.S. 840 (1980). Due to this conflict and, indeed, to the uncertainty reflected by the Second Circuit, this petition should be granted.

III

A "Clear and Convincing" Evidentiary Standard Should Be Employed When Determining Whether A Defendant Has Waived His Confrontation Rights.

Beyond the conflict among the Circuits, there is the more basic issue of which standard of proof should apply in determining whether there has been a waiver. On this issue, the Fifth Circuit's reasoning in *Thevis* is compelling. The court there focused upon the fact that hearsay issues involve questions concerning the reliability of evidence. *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The court stated:

> Where reliability of evidence is a primary concern, the Supreme Court has conditioned admissibility on the "clear and convincing" standard. The prosecution, for example, must prove by clear and convincing evidence that an in-court identification that follows a tainted identification has a

> reliable independent basis before the identification can be admitted into evidence...Thus, because confrontation rights are so integral to the accuracy of the fact-finding process and the search for truth...we conclude that the trial court was correct in requiring clear and convincing evidence of a waiver of this right.

665 F.2d at 631.

In contrast, as noted in *Thevis*, the preponderance of the evidence test is generally applicable only in situations where an evidentiary determination involves the exclusionary rule, which is aimed at deterring police misconduct. Thus, for example, in *Lego v. Twomey*, 404 U.S. 477, 489 (1972), this Court established a preponderance test for determining the voluntariness of a confession. Clearly then, since the admission of hearsay raises questions of reliability, the clear and convincing test should apply.

In this case, the Second Circuit did recognize this distinction, noting that "the right of confrontation is closely related to the reliability of testimonial evidence, [and that, accordingly,] the clear and convincing test may well apply to issues of admissibility arising under it". (33a), the court then stated that "waiver by misconduct is an issue distinct from the underlying right of confrontation and not necessarily governed by the same rule concerning burden of proof." (33a) For this reason, the court opted for the preponderance standard, noting that "there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself." (33a)

Yet this analysis is surely wrong. Given the Confrontation Clause's focus upon reliability, it is inadvisable to dilute this Constitutional protection by requiring a less than strenuous burden of proof. If one is concerned with ensuring that unreliable evidence be kept from the jury, why invite its admission by requiring the government to prove so little?

Indeed, the vice of requiring proof only by a preponderance of the evidence is forcefully demonstrated in

this case. Quite simply, no one reading the transcript of Mastrangelo's hearing could be comfortably assured that Mastrangelo did in fact have prior knowledge of the plan to kill Bennett. Petitioner recognizes that Judge McLaughlin's findings of fact are not subject to substantial challenge here. However, if the evidence presented by the government at the hearing did in fact meet the preponderance standard, it is therefore a standard wholly incapable of protecting a defendant's confrontation rights. To make this point clear, a further review of the evidence adduced at the post-remand hearing is necessary.

A. Nicholas Berardi's Testimony

Unquestionably, Berardi was the most crucial government witness at the hearing, for it was he who offered the only evidence even remotely suggesting that Mastrangelo had knowledge of the murder prior to its occurrence. Yet, his testimony hardly establishes with any certainty that Mastrangelo had prior knowledge of the plan to kill Bennett.

1. The Substance Of Berardi's Testimony Is Unclear

In the final analysis, the only unequivocal aspect of Berardi's testimony concerning Mastrangelo related to the alleged "phone call" conversation. After extensive cross-examination, questioning by the court, and being confronted with the agent's draft report of his meeting with Walter Mack, Berardi finally made clear that the phone call concerning Bennett was made without Mastrangelo's knowledge and that Mastrangelo learned about the phone call only after he complained about the murder to his "friends". Beyond this information, which certainly does not in any way support the inference that Mastrangelo had prior knowledge of the murder, *see infra*, Berardi never elaborated on his views concerning the extent of Mastrangelo's culpability.

Instead, Berardi provided the court with a completely bewildering and self-contradictory account of

what he knew about Mastrangelo.[9] Almost from the beginning of his appearance before the court, the witness refused to be pinned down on the implications of his testimony. When asked whether Mastrangelo had indicated to him in substance that "a decision was made that the witness had to be killed", Berardi responded: "I can't answer that because I can't – I would be giving you an opinion." (H 227) Later on, after being confronted with the draft report of his conference with Walter Mack, he admitted that he had previously stated that Mastrangelo "did not know about the murder and did not know the murder was going to occur." (H 431) Then, when asked about the significance of that statement, he suggested that he was saying only that Mastrangelo did not know who the actual killer was. (H 443-45)

Quite clearly, the question that logically flowed from this last answer was whether Mastrangelo knew, in general, that someone was going to kill Bennett. Yet this is the question that was never satisfactorily answered. At one point, Berardi said that Mastrangelo did have such knowledge. (H 444) Yet, he later appeared to retract this conclusion when, in answer to the court's questioning concerning this supposed conclusion, he stated: "I'm sticking to my statement of what he told me in November. Phone call was made and the guy had to get whacked out." (H 448)

This equivocation, when viewed in conjunction with (1) the agent's draft report which attributed statements to Berardi that were clearly exculpatory of Mastrangelo; (2) Walter Mack's vague characterizations of Berardi's "organization" theory (H 505-07); and (3) a stipulation that the agent could not recall whether or not Berardi believed that Mastrangelo knew about the murder before it occurred, leads inexorably to the conclusion that it is still unclear what Nicholas Berardi was saying

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[9] The District Court recognized Berardi's shortcomings as a witness when, in response to Walter Mack's observation that "you do have to work at times to find out precisely what he [Berardi] has to say", it stated: "That is the understatement of 1983." (H 471)

about Mastrangelo. The witness never unequivocally stated his beliefs about what Mastrangelo knew and when he knew it.

2. Even If Berardi Believed That Mastrangelo Had Prior Knowledge Of The Murder, It Is Difficult To Identify A Rational Basis For This Conclusion.

One of few things clearly established by Berardi's testimony was that Mastrangelo never confessed to Berardi that he [Mastrangelo] participated in or had prior knowledge of the murder of James Bennett. (H 445-46) Hence, the most that Berardi could have offered was his belief that Mastrangelo had prior knowledge. However, even if one agrees with the District Court that Berardi finally did state that, in his opinion, Mastrangelo had such information, there still remains the question of the basis for that belief. Specifically, it is worth inquiring into the factual basis for Berardi's opinions on the matter and asking whether his inferences were justified. Petitioner contends that Berardi hardly offered facts sufficient to justify the inference that Mastrangelo had prior knowledge of Bennett's murder.

Throughout his testimony, Berardi was constantly interrogated about the grounds for his conclusions, whatever they were, regarding Mastrangelo's involvement in the murder. To be sure, the "phone call" conversation with Mastrangelo played a crucial part in Berardi's ratiocination. But, surely, the "fact" that, in response to his complaints about the timing of Bennett's murder, Mastrangelo learned, after the death of Bennett, that a "phone call" had been made and that "the guy had to get whacked out" (H 448) hardly provides rational support for the conclusion that Mastrangelo had prior knowledge of the murder. When questioned, though, about the other grounds for his "beliefs" about Mastrangelo's involvement, Berardi could only alternatively characterize these grounds as "opinion" (H 423), "feelings" (H 434), "talk" (H 434), his "intelligence" (H 447), what he "imagine[d]" (H 444), and his "common sense". (H 448)

In other words, Berardi was unable to point to one additional ground for his views beyond Mastrangelo's alleged statements to him about the phone call. Indeed, when pressed by the court on this point, Berardi admitted that the "sole source" of his conclusion was "what he [Mastrangelo] told me in November. Phone call was made and the guy had to get whacked out." (H 343)

3. Berardi's Testimony Was Not Credible.

Berardi's testimony had severe credibility problems because (a) he had a strong motive to testify falsely, and (b) part of his testimony at the hearing, including one crucial corroborating detail of his Mastrangelo story, was shown to be false.

a. Berardi had a strong motive to give false testimony.

Beyond Berardi's long criminal history, *see* fn.6, *supra*, which in itself demonstrates that honesty is not one of his virtues, there lies the simple fact that Berardi had every incentive to create, out of whole cloth, a story that would incriminate Mastrangelo and thereby please the government. At the time of the hearing, Berardi was faced with serving at least six more years in prison on the federal extortion and New York manslaughter convictions. But Berardi had hopes of an earlier release. He had had a motion for reduction of sentence on the extortion charge pending before Judge Stewart in the Southern District of New York for nine months. (H 415) In Berardi's view, his cooperation with the government was "[t]he only shot I got" (H 416) to obtain a sentence reduction. It is also clear that his testimony about Mastrangelo was tied to hopes of improving his situation vis-a-vis the New York State homicide charges. It should be recalled that Berardi first testified under oath about Mastrangelo in April, 1982. (H 417) At that time, he was facing New York State charges of murder in the second degree (H 418), N.Y. Penal Law §125.25, a crime which calls for a minimum sentence of 15 years to life

imprisonment. N.Y. Penal Law §70.00. It was only after testifying about Mastrangelo in the grand jury that, in December, 1982, Berardi was permitted to plead guilty to manslaughter. (H 419) Thus, prior to cooperating with the government (a cooperation which extended to matters other than Mastrangelo's (H 411)), Berardi was facing a possible 18 years or more of imprisonment.

The prospect of an extraordinarily long prison sentence gave Berardi every motive to lie. His testimony, although obscure, showed that he is by no means unintelligent. He surely realized the importance of the Mastrangelo case to the government and recognized that providing "evidence" of Mastrangelo's involvement in Bennett's murder could only be a boon to his chances for an early release from prison. For this reason his testimony should be considered with a bushel, rather than a grain, of salt.

b. Berardi's testimony at the hearing was untruthful.

Admittedly, the mere existence of a motive to lie does not prove that a witness has in fact been untruthful.[10] However, there is more here than just motive. That is, Berardi's credibility was further damaged by the fact that parts of his testimony at the hearing were shown to be false.

Berardi's testimony as to his motives for giving evidence was, at a minimum, very misleading. Initially, he stated that he was testifying because the government had agreed to make the extent of his cooperation "known to certain parties". (H 213) On cross-examination, more "details" about his expectations were elicited. Berardi gave the clear impression that Judge Stewart had denied his motion to reduce sentence on the extortion charge (H 259) and that he expected, "with my record, I got to do six-eight" on the federal charge.

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[10] Analogously, that Mastrangelo may have had a motive to kill James Bennett does not prove that he had any prior knowledge of the murder plot.

(H 262) As for the state sentence, Berardi stated: "I haven't received nothing, if that's what you mean. On the matter. I have – I still have consecutive sentence." (H 261) According to Berardi, he was testifying only in exchange for a letter to the Federal Parole Board and a letter in support of an application for clemency on the manslaughter charge. (H 262) Berardi stated, though, that he did not place much value on these letters (H 408) and that "I'm not here for help." (H 262)

Yet, on a subsequent cross-examination that took place after the government provided defense counsel with a redacted transcript of Berardi's April, 1982, grand jury testimony, a wholly different story emerged. It became clear that Berardi had more at stake than a few "meaningless" letters from the United States Attorney's Office. In fact, he had lied in insisting that he was "not here for help" (H 262) because, as discussed above, Berardi's motion for reduction of sentence before Judge Stewart was still pending and his hopes for that motion being granted were tied to his cooperation with the government. (H 415-16) Similarly, Berardi had previously misled the court concerning the connection between his Mastrangelo testimony and his New York State homicide charges. While it was true that, despite his cooperation, he had received a consecutive sentence for this crime, he had neglected to mention that, *at the time he first testified against Mastrangelo*, he was facing the far more serious charge of second degree murder. Indeed, before being confronted with his prior testimony, Berardi continued to insist that he had pleaded guilty *prior* to his grand jury testimony (T 416) and implied that New York State had not charged him with anything more serious than manslaughter. (H 416-17)

But there is more than these attempts by Berardi to camouflage his motives for testifying and thereby falsely inflate his credibility. In fact, Berardi's testimony about Mastrangelo was marred by a critical lie. Throughout his testimony, Berardi insisted that, shortly after his "telephone call" conversation with Mastrangelo, he related the substance of that discussion to the

government agent with whom he dealt. (H 253, 297, 429, 435, 449) Berardi, who allegedly made this call just five minutes after his conversation with Mastrangelo (H 449), testified that, in addition to reporting what Mastrangelo had said to him, he also told the agent that "this kid, to my eyes, he's getting weak and...I said I think you should get the Bronx - the Brooklyn office, I think you could move this kid." (H 297)

This aspect of Berardi's testimony was crucial, for it strongly corroborated the rest of his testimony about Mastrangelo. That is, it is virtually inconceivable that a government informant, greatly in need of the government's help, would not immediately contact his control agent after acquiring evidence about the murder of a government witness. As noted, Berardi was not stupid and he surely would have recognized the importance of the information he allegedly obtained from Mastrangelo.

Yet, it is clear that this critical part of Berardi's story was a complete fabrication. This stipulation concerning the expected testimony of the agent with whom Berardi allegedly spoke establishes that Berardi never reported his supposed conversation with Mastrangelo. Rather, the agent did not recall hearing the name Richard Mastrangelo until the February 26, 1982, meeting between Berardi and Walter Mack. (H 519) Surely, the agent's recollection is controlling, as federal agents do not "forget" about information concerning the murder of a government witness. If Berardi actually had spoken to the agent in November, 1981, common sense leads one to the conclusion that the agent would have acted upon this information or, at least, remembered it.[11]

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[11] Also worth noting in this context is the fact that, prior to Walter Mack's February, 1982, meeting with Berardi, the agent never even suggested to Mack that Mastrangelo had any information about the Bennett murder. (H 489-90) If Berardi had told the agent about Mastrangelo's "admission", the agent undoubtedly would have mentioned it to Mack.

B. Joseph Bennett's Testimony

The value of Joseph Bennett's testimony is dubious for two reasons. First, his story was so inherently incredible that it defies belief. Second, it was hardly probative on the issue of Mastrangelo's involvement in James Bennett's murder.

According to Bennett, he was introduced to Mastrangelo through a mutual friend, Louis Collelo. (H 32-33) Yet, when this initial meeting took place, Collelo was not present. Rather, Bennett arrived at Mastrangelo's shop and simply asked Mastrangelo if he had any drugs to sell. (H 34-35) Even though Bennett was a complete stranger, Mastrangelo allegedly offered to sell him "speed". (H 35) This scenario, though, surely never occurred. Common sense, this court's past experience in hearing narcotics appeals, as well as Berardi's testimony that Mastrangelo was "closed-mouthed" (H 215) leads to the conclusion that if Richard Mastrangelo had been a seller of narcotics, he would not have spoken so openly to a total stranger.

Next, there is Bennett's testimony that Mastrangelo offered him an opportunity to help off-load a boat, presumably the "Terry's Dream", containing marijuana. (H 42-46) During this period, Bennett and Mastrangelo were apparently dealing in drugs on a regular basis. (H 41-42) But when offered the opportunity to make a substantial amount of money on a narcotics-related transaction, Bennett supposedly refused because he had jumped bail. It simply makes no sense that Bennett would be willing to sell drugs, a very risky proposition, but would refuse, out of caution, to unload a ship. This leap of logic in Bennett's testimony is yet another suggestion that his testimony was the product of a creative and opportunistic imagination.

Of course, the most crucial part of Bennett's testimony related to the alleged conversation with Mastrangelo in the Canarsie Bar where Mastrangelo apparently asked Bennett to speak to his uncle, James Bennett, on his [Mastrangelo's] behalf. That Mastrangelo would have even known that James Bennett

was the witness' uncle is open to question because, according to the witness, he had no relationship with his father's side of the family and had spoken to his uncle only "once maybe 20 years ago." (H 56) Yet, perhaps through some variety of psychic power, Mastrangelo did know that James Bennett was Joe Bennett's uncle. More incredible, though, is that Mastrangelo then allegedly told Joe Bennett that, in any event, James Bennett would never testify against Mastrangelo. (H 50) Surely, as a matter of common sense, it is obvious that if Mastrangelo believed that Joe Bennett was close enough to his uncle to be able to stop him from testifying, he would not then have suggested to Joe Bennett that his uncle was in some sort of danger.

Casting further doubt on this part of Bennett's testimony are his actions *after* he agreed to cooperate with the federal government in November, 1979. At that point, he was facing (1) New York State charges of assault and robbery (H 24); (2) New York State charges of possession of forged instruments (H 24); (3) New York State bail jumping charges (H 24); (4) New York State charges of possession of stolen property (H 25); and (5) federal charges involving the theft and resale of stolen motor vehicles. (H 26) With all of these charges hanging over him, it is not surprising that Bennett offered his complete cooperation to the government. As Bennett himself admitted, it was to his benefit to tell the government everything he knew. (H 68) Yet, when he began cooperating with the government in November, 1979, he failed to mention either that his own uncle might be in danger or, more generally, that he had information about an as yet unsolved major marijuana importation case.[12] Further, Bennett continued to remain silent about the Canarsie Bar conversation even after he learned that his uncle had been killed. Although he was upset about the murder of his uncle (H 77) and although he was cooperating with the government at

[12] According to the docket entries in this case, the grand jury did not return its indictment against Mastrangelo until June 17, 1980.

that time (H 62), Bennett did not inform the government of his information about Mastrangelo until June of 1981 – some two months after his uncle's murder. (H 78)

A cooperating witness who has everything to gain from full disclosure to the government does not neglect to mention that his own uncle is in danger because that uncle is helping the government solve a major drug case. The witness' explanation on this point was that, due to his lack of a close relationship with his father's side of the family (H 54), it never "dawned" on him to mention the alleged threat to his uncle. However, to accept this explanation is to reject common sense. In light of the facts that Bennett knew a number of people who were close to either James Bennett or his brother, Frank Bennett, and that Joe Bennett, himself, was angry over his uncle's murder (H 77-78), the "lack of personal connection" argument does not hold water. The far more compelling explanation here is that there was no conversation between Mastrangelo and Bennett in the Canarsie Bar. Rather, Joseph Bennett invented it in the hopes of improving his own situation.

As for the probative value of Joe Bennett's testimony, the only "revelation" it contained was Mastrangelo's alleged statement that James Bennett would never testify against him. (H 50) Admittedly, if this statement had been made shortly before Bennett's murder, it would be solid evidence of Mastrangelo's culpability. But, according to Bennett, Mastrangelo made this statement in early 1979 (H 47-49), *more than two years before James Bennett was killed.* Given the ambiguity of Mastrangelo's alleged statement, this gap in time does not support the inference that Mastrangelo knew of the plot to kill Bennett.

As Joseph Bennett admitted, Mastrangelo's supposed statement could have meant "anything". (H 52) As the District Court suggested, Mastrangelo might have been suggesting that he was going to offer James Bennett a bribe. (H 51-52) It also could have been an expression of Mastrangelo's belief that James Bennett would ultimately refuse to inculpate an old friend from

the neighborhood. Or it could have been an expression of bravado by Mastrangelo. Indeed, Mastrangelo might have been merely repeating vague assurances given to him by others.

All of these interpretations are sensible. Therefore, it would be absurd to conclude that Mastrangelo was, in fact, revealing to Bennett knowledge of a plot to kill Bennett's uncle. Indeed, given that this supposed conversation took place two years prior to James Bennett's murder, it is highly unlikely that there was even a plan afoot at that time to kill the witness. Rather, as suggested by Mastrangelo's alleged overtures, less drastic methods of dealing with James Bennett were being pursued.

Thus, Bennett's testimony does not show that Mastrangelo had prior knowledge of the plot to kill James Bennett. Even if his tale about the Canarsie Bar is true, it only establishes that Mastrangelo held the belief that James Bennett would not testify against him. It does not then lead to the further conclusion that Mastrangelo either knew or believed that, should James Bennett decide to help the government, he would be murdered. Indeed, if Mastrangelo did consider murder to be a possibility, he undoubtedly would not have spoken about it to Joe Bennett, whom he believed to be close enough to his uncle to intercede on Mastrangelo's behalf.[13]

As noted, petitioner recognizes that it would be foolhardy to challenge the legitimacy of Judge McLaughlin's evidentiary findings. Although petitioner still contends that the government did not even meet a preponderance of the evidence burden, it is conceded that Judge McLaughlin's finding was not clearly erroneous. Yet, it is precisely because Judge McLaughlin's finding was

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[13] Further, Joseph Bennett's own testimony can be viewed as providing support for the claim that Mastrangelo's statement did not presage a murder plot. If Joseph Bennett did not invent the Canarsie Bar conversation, the only other credible explanation for his failure to mention it until June of 1981 is that he personally did not believe that Mastrangelo's statements suggested violence to his uncle.

arguably correct that the preponderance of the evidence standard should not be adopted in connection with determining whether a criminal defendant has waived his Sixth Amendment rights.

A defendant's right to confront the witnesses against him is a singularly important constitutional right. Plainly stated, he should not be stripped of that right upon evidence as paltry as that offered by the government in this case. Indeed, "[t]here is a presumption against the waiver of constitutional rights...." *Brookhart v. Janis, supra*, 384 U.S. at 4. However, by adopting a preponderance of the evidence standard, the Second Circuit has significantly diminished the protections of the Confrontation Clause, making it virtually impossible for a criminal defendant to refute a claim of waiver. That is, if the slight and unconvincing evidence in this case legitimately formed a basis for a finding of waiver, it is virtually impossible to conceive of a situation where the government could not make a showing of similar strength. Surely, the Confrontation Clause deserves more respect.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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JUDD BURSTEIN
On the Petition

APPENDICES

Appendix A
Opinion of United States Court of Appeals
Decided November 4, 1983

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 82-1148

No. 140 — August Term, 1982
Submitted August 4, 1983, Decided November 4, 1983

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v.-

RICHARD MASTRANGELO,
Defendant-Appellant.

Before: FEINBERG, Chief Judge; OAKES and WINTER, Circuit Judges

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Appeal from a decision of the United States District Court for the Eastern District of New York (McLaughlin, *Judge*) holding that a preponderance of the evidence suggests that appellant Mastrangelo had prior knowledge of a plot to kill a government witness.

Affirmed.

Gerald L. Shargel
New York, New York
(Judd Burstein, of counsel)
For Appellant Mastrangelo

William J. Muller, Assistant United States Attorney, Eastern District of New York (Raymond J. Dearie, United States Attorney, Eastern District of New York, L. Kevin Sheridan, Assistant United States Attorney, of counsel), *for Appellee United States of America.*

Appendix A - Opinion of United States Court of Appeals Decided November 4, 1983

Per Curiam:

Familiarity with our prior opinions, *United States v. Mastrangelo*, 662 F.2d 946 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 2236 (1982) and 693 F.2d 269 (2d Cir. 1982), is assumed.

On remand after our most recent decision, Judge McLaughlin held a hearing and found that the government had proven by a preponderance of the evidence that the appellant had prior knowledge of the plot to kill James Bennett. Appellant concedes this finding is not clearly erroneous. He argues, however, that we should decline to follow our decision that prior knowledge and a failure to warn appropriate authorities is sufficient to constitute waiver of the right to confrontation and that such waiver need be shown by only a preponderance rather than by clear and convincing evidence. Judge McLaughlin found that the latter test had been satisfied but that the former had not been. We adhere to our prior opinion, which is also supported by *Steele v. Taylor*, 684 F.2d 1193, 1202-03 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1501-02 (1983).

The judgment is, therefore, affirmed.

Appendix B
Order of United States Court of Appeals on Petition fon Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 19th day of December, one thousand nine hundred and eighty-three.

No. 82-1148

Filed: December 19, 1983

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v.-

RICHARD MASTRANGELO,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Richard Mastrangelo,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

/s/ _____

A. Daniel Fusaro
Clerk

by Victoria C. Dalton
Deputy Clerk

Appendix C
Opinion of United States District Court
Dated April 15, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

RICHARD MASTRANGELO

Defendant.

No. 80 CR 285 (S-1)

Defendant was convicted in the United States District Court of conspiracy to possess, with intent to distribute, controlled substances, importation of controlled substances and obstruction of justice, and he appealed. The Court of Appeals, 693 F.2d 269, remanded for evidentiary hearing on issue of whether defendant effectively waived his rights under confrontation clause to admission of grand jury testimony of deceased government witness. On remand, the District Court, McLaughlin, J., held that: (1) evidence was sufficient under preponderance standard to support finding that defendant had prior knowledge of plot to murder government witness and failed to warn appropriate authorities; therefore, defendant through his own misconduct, waived his confrontational objection to use of murdered witness' grand jury testimony, and (2) Government's obligation under rule allowing admission of hearsay if statement is more probative on point for which it is offered than any other evidence which proponent can procure through reasonable efforts did not require it to determine, in order to have grand jury testimony of deceased witness admitted at defendant's trial, that second witness was not subject to a court order compelling his testimony.

Motion for new trial denied.

See also, D.C., 533 F.Supp. 389.

Appendix C - Opinion of United States District Court Dated April 15, 1983

Raymond J. Dearie, U.S. Atty., E.D.N.Y. (William J. Muller, Asst. U.S. Atty. Brooklyn, N.Y., of counsel), for the U.S.; L. Kevin Sheridan, Asst. U.S. Atty., Brooklyn, N.Y., on brief.

Gerald L. Shargel and Michael Coiro, New York City, of counsel, for defendant; Judd Burstein, New York City, on brief.

MEMORANDUM AND ORDER

McLAUGHLIN, District Judge.

On April 27, 1982 defendant, Richard Mastrangelo, was convicted of conspiracy to possess, with intent to distribute, controlled substances, importation of controlled substances and obstruction of justice. As a result of this conviction, Mastrangelo was sentenced to a total of nine years imprisonment and was fined $20,000.00. In addition, a special parole term of ten years was imposed.

On appeal, Mastrangelo sought reversal of his conviction on the ground that this Court had improperly admitted into evidence the grand jury testimony of James Bennett, a government witness who was murdered on the morning he was scheduled to testify at Mastrangelo's first trial before Chief Judge Weinstein.

The United States Court of Appeals for the Second Circuit remanded the case for an evidentiary hearing on the issue of whether Mastrangelo effectively waived his rights under the confrontation clause of the sixth amendment through complicity in the murder of the principal witness against him. The Court of Appeals instructed that:

> If the District Court finds that Mastrangelo was in fact involved in the death of Bennett through knowledge, complicity, planning or in any other

> way, it must hold his objections to the use of Bennett's testimony waived. Bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities is sufficient to constitute a waiver.

United States v. Mastrangelo, 693 F.2d 269, 273-74 (2d Cir. 1982). The Court of Appeals directed that evidence of Mastrangelo's complicity in the murder of Bennett should be evaluated under the "preponderance of the evidence" standard of proof, as well as the "clear and convincing evidence" standard in order to expedite further proceedings. *Id.*

Pursuant to the Court of Appeals' mandate, an evidentiary hearing was held before this Court, beginning December 20, 1982 and continuing through December 23, 1982. The evidence included, *inter alia*, (a) the testimony of Joseph Bennett (the nephew of the murdered witness James Bennett), Nicholas Berardi, and Assistant United States Attorney Walter Mack; (b) the prior grand jury testimony and other written statements of Joseph Bennett and Nicholas Berardi; and (c) the prior proceedings and exhibits in the case, including a February 1, 1979 tape-recorded conversation between Mastrangelo and James Bennett.

Based upon this evidence, as discussed below, I find that the Government has established by a preponderance of credible evidence that Mastrangelo had prior knowledge of a plot to murder James Bennett and failed to warn the appropriate authorities. I find, however, that the Government has not established Mastrangelo's prior knowledge of the murder plot by "clear and convincing" evidence.

Additionally, for the reasons developed below, the motion filed by Mastrangelo at the conclusion of the evidentiary hearing for an order, pursuant to Fed.R. Cr.P. 33, granting him a new trial is denied.

Appendix C - Opinion of United States District Court Dated April 15, 1983

THE EVIDENTIARY HEARING

1. JOSEPH BENNETT

The Government's first witness was Joseph Bennett, a participant in the federal witness protection program with a substantial criminal record. Transcript ("Tr.") at pp. 21-26. Bennett, the nephew of the murdered witness, James Bennett, testified that he met Mastrangelo in late 1975, Tr. at p. 32, and that he and Mastrangelo subsequently engaged in approximately 12 to 15 drug transactions. Tr. at p. 41.

Bennett testified that in January, 1978 Mastrangelo offered him $10,000 to assist in the unloading of a large shipment of marijuana. Tr. at pp. 42-43. Bennett refused the offer because "I had jumped bail again and I really didn't want to get involved in it." According to Bennett, Mastrangelo twice renewed this offer and Bennett, for the same reason previously given, rejected it on both occasions. Tr. at pp. 44-45.

Shortly after this, Bennett learned that federal officers had seized a large shipment of marijuana in the Jamaica Bay area of Queens, New York. Bennett concluded "[t]hat Richie [Mastrangelo] lost a lot of grass." Tr. at p. 46.

A few months later Bennett met Mastrangelo at the Canarsie Bar in Brooklyn at Mastrangelo's request. According to Bennett, Mastrangelo told him at this meeting that Mastrangelo was concerned that James Bennett would implicate him in the Jamaica Bay drug conspiracy. Tr. at p. 49. Mastrangelo asked Bennett to intercede with James Bennett in an attempt to dissuade him from testifying against Mastrangelo before the grand jury. Tr. at p. 49. Bennett refused this request, suggesting instead that Mastrangelo offer James Bennett a $100,000 bribe. Tr. at pp. 49-50. According to Bennett, Mastrangelo responded as follows:

BENNETT: He [Mastrangelo] said that I shouldn't be concerned about what he would do to stop my uncle from testifying, that he would—that I should be sure that he wouldn't take the stand against him or words to that effect. I don't recall the exact language that was spoken.

QUESTION: But words to the effect that you shouldn't worry about it?

BENNETT: Right.

QUESTION: That your uncle would never take the stand against him; is that your testimony?

BENNETT: Yes, I don't know if those were the exact words. . . . The substance was that—that he wouldn't stand for my uncle testifying against him, that that wouldn't happen . . . .

Tr. at. pp. 50-51.

When asked if Mastrangelo had divulged the existence of a plan to prevent James Bennett from testifying, Bennett responded as follows:

BENNETT: Well, I don't recall a word blank [sic] used. He seemed to have something in mind. I don't—I didn't explore what it was that he had in mind. I just didn't want to be involved in whatever he had in mind.

QUESTION: Why do you say he seemed to have something in mind, Mr. Bennett?

BENNETT: He just—I just left with the impression that he had something in mind.

QUESTION: Did Mr. Mastrangelo indicate to you whether he had already spoken to Mr. Bennett?

BENNETT: Yes, he told me that he had spoke to him and that he didn't think that he got across to him, how serious he was about him not testifying against him.

QUESTION: Did Mr. Mastrangelo tell you in substance that there was no way that that man was going to take the stand against him?

BENNETT: Yes, in substance that's what I understand what he said.

Tr. at pp. 52-53.

2. NICHOLAS BERARDI

The Government next called Nicholas Berardi, also a participant in the federal witness protection program, Tr. at p. 210, who, like Joseph Bennett, has a substantial criminal record. Tr. at pp. 211-212. Berardi met Mastrangelo in August, 1981 at the Metropolitan Correctional Center in New York where both men were incarcerated. Tr. at p. 214. Berardi and Mastrangelo became friends and talked on a regular basis. Tr. at p. 215.

The most significant portion of Berardi's testimony related to a conversation he had with Mastrangelo in November, 1981 concerning the killing of James Bennett. Tr. at p. 222. The pertinent portion of Berardi's direct examination follows:

QUESTION: All right. Now did you have a specific conversation with Mr. Mastrangelo regarding the death of James Bennett?

BERARDI: Yes, we did.

* * * * * *

QUESTION: What did you tell him about the timing of James Bennett [sic]?

BERARDI: I had mentioned something, you know, his friends, just, idle talk, that his friends are doing no favor by whacking out this guy on the day of his [Mastrangelo's] trial.

QUESTION: And what did he say to you?

BERARDI: He said to me he had no choice, no alternative and it had to be done, a phone call was made and it had to be done.

QUESTION: What did he tell you about the phone call?

BERARDI: Just said that a phone call was made and he had to get whacked out.

QUESTION: Who did he say received the phone call?

BERARDI: He didn't say.

Tr. at pp. 222-223.

The Court then questioned Berardi:

THE COURT: I am confused about who called whom. Who received the call and where was it? Did Mr. Mastrangelo—let me ask the question—did Mr. Mastrangelo tell you who placed the call?

BERARDI: No, he didn't.

THE COURT: Did he tell you who specifically received the call?

BERARDI: No, he didn't.

THE COURT: He told you that a call was received the night before the hit, the night before the murder?

BERARDI: A phone call was made.

THE COURT: A phone call was made?

BERARDI: That's right.

THE COURT: Based on your conversation with Mr. Mastrangelo, did he tell you why the call was made or what the purpose of the call was?

BERARDI: No, he didn't.

Tr. at p. 225.

During his redirect testimony Berardi, in response to a question from the Court, offered his opinion on the purpose of the phone call in question.

QUESTION: Phone call was made to find out where the witness Bennett, the dead witness Bennett was? Is that what you're saying?

BERARDI: Yes.

Tr. at p. 439.

As the flavor of the foregoing excerpts might suggest, Berardi cannot be described as a commanding witness. His testimony lacked coherence and, in some cases, consistency. For example, he also testified that, when interviewed by Assistant United States Attorney Walter Mack on February 26, 1982, he stated in substance, that Mastrangelo did *not* know about the murder and did *not* know the murder was going to occur. Tr. at p. 431. Moreover, Berardi stated that Mastrangelo may have learned of the phone call *after* the killing. Tr. at pp. 432, 433, 436, 456.

Despite Berardi's testimony that Mastrangelo may not have learned until after Bennett's killing about the placement of the phone call disclosing the whereabouts of Bennett to his killers, Tr. at pp. 432-433, 436, 456, Berardi stated that he believed Mastrangelo had prior knowledge that Bennett was to be murdered:

> QUESTION: All right. If you told an agent or Walter Mack in February that Mastrangelo did not know the murder was going to occur, tell the Judge exactly what it is you meant by that.
> BERARDI: Just what I said.
> QUESTION: Say it again.
> BERARDI: He didn't know—he knew—I imagine he knew it was going to happen eventually.
> THE COURT: That's the key question.
> QUESTION: Is it your opinion based on your conversations with Richard Mastrangelo that he knew the murder was going to occur?
> BERARDI: Yes.

Tr. at p. 444.

The Court then questioned Berardi regarding the basis of his opinion that Mastrangelo had prior knowledge of a plot to eliminate James Bennett:

> THE COURT: The critical question is did he know that it would happen? And you've said "yes" to

that several times. But in answer to Mr. Shargel [Mastrangelo's counsel], you said yes, in my opinion, I imagine it, I speculate it, as common sense. In answer to Mr. Muller's [Assistant United States Attorney] question you said it's based on what Mr. Mastrangelo told me.

BERARDI: Many conversations.

THE COURT: That's the area that's gray and it's got to be cleared up if this issue is to be settled. What is it in Mr. Mastrangelo's conversation with you that leads you to believe he knew the witness would be killed?

BERARDI: He knew that it was—I would put it he knew the guy was going to get whacked out.

THE COURT: How did he know it? How do you know he—?

BERARDI: Talk—I am giving—that's the only thing I could do, give you my feeling based on conversations with him.

THE COURT: You say "based on conversations." You must tell me, if you can, what—

BERARDI: A period of four months, your Honor, with this guy, 17 hours a day.

THE COURT: What did he say to you? What did he say to you that would support your—

BERARDI: I am sticking to my statement of November.

THE COURT: I'm sorry?

BERARDI: I'm sticking to my statement of what he told me in November. Phone call was made and the guy had to get whacked out.

THE COURT: Is that the sole source of your conclusion?

BERARDI: Yes, yes. I have to stick with that.

Tr. at pp. 447-48.

3. WALTER MACK

Assistant United States Attorney Walter Mack testified about his February 26, 1982 interview with Berardi. This interview was conducted in the presence of an FBI agent whose identity was not revealed at the hearing for fear of prejudicing ongoing investigations of organized crime. Tr. at p. 459.

Mack, having been called as a defense witness, testified that the FBI Agent's draft report of Mack's February 26th interview with Berardi was not entirely accurate. Tr. at p. 466. The report, a general recapitulation of Berardi's statements to Mack concerning Mastrangelo, stated: "Mastrangelo did not know the murder was going to occur, or who actually did it; however, it is clear that he was the beneficiary." Defense Exhibit C. Mack testified that he was dissatisfied with the report "[b]ecause it did not comport with my recollection of what had been said." Tr. at p. 495. Mack's testimony on cross-examination concerning his interview of Berardi was as follows:

> MACK: It was very clear after talking to Nicky [Berardi] that at least Richard Mastrangelo's statements to him did not imply that your client [Mastrangelo] knew that James Bennett would be walking down the street at that time and there was going to be—was going to be shot. But he [Mastrangelo] did know that people within his organization were going to see to it that James Bennett never made it to court. That was the import and the basis of what Berardi said. Berardi said that Richard Mastrangelo said.
>
> THE COURT: Insofar as that document [the Agent's draft report of Mack's February 26, 1982 interview of Berardi] suggests to the contrary, that document is wrong?
>
> MACK: That's correct.

Tr. at pp. 499-500; *see also* pp. 501, 504 and 507.

Although the Agent who was present with Mack at the February 26th interview of Berardi did not testify at the hearing, the parties stipulated that the Agent's testimony would have been that the sentence within the Agent's report which stated that "Mastrangelo did not know the murder was going to occur . . ." means that "Mastrangelo did not know the details of the murder, and did not know it would occur precisely when it did." Tr. at p. 519. The stipulation further provided that "[t]he Agent does not recall if Berardi believes Mastrangelo had prior knowledge that the witness would be killed." *Id.*

FINDINGS

(1) *Preponderance Of The Evidence Standard*

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Court explained that the function of any particular standard of proof is "to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Id.* at 423, 99 S.Ct. at 1807, *quoting In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970) (Harlan, J. concurring).

In the present case, the Court of Appeals has stated that "[w]e see no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where waiver by misconduct is concerned." *United States v. Mastrangelo*, 693 F.2d at 273. The preponderance standard, in turn, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence'." *In re Winship*, 397 U.S. at 371-372, 90 S.Ct. at 1076 (Harlan, J. concurring) (citation omitted).

Having observed the demeanor of Bennett and Berardi on the stand, I find their testimony generally credible. I state this advisedly after consideration of their substantial criminal records and their possible motivations for perjury. *See* Defendant's Post-Hearing Synopsis Of The Evidence and Memorandum of Law, pp. 23-25 and 32-36.

Although not free of inconsistencies, their testimony, taken as a whole, was persuasive evidence of Mastrangelo's prior knowledge of a plot to kill James Bennett. Joseph Bennett testified that Mastrangelo was determined to prevent James Bennett from taking the stand; and Nicholas Berardi testified that according to Mastrangelo the elimination of Bennett was a necessity. Although no direct evidence was adduced to establish Mastrangelo's prior knowledge of the plot to kill James Bennett, Mastrangelo's statements to Bennett and Berardi constitute circumstantial evidence from which the inference of prior knowledge may be drawn.

Mastrangelo contends that Berardi's testimony constitutes nothing more than an unsubstantiated opinion by Berardi that Mastrangelo had prior knowledge. He argues that Berardi's opinion is insufficient to support a finding of Mastrangelo's prior knowledge. The Court, as trier of the facts, may reject the opinion of a witness as unsubstantiated by that witness' personal knowledge and yet arrive at the same conclusion the witness has reached after analyzing all the evidence in the case. The Court's conclusion, then, is not the improvident adoption of a witness' unsubstantiated opinion, but rather an independent finding of fact based upon all the available evidence.

[1] Examination of all the available evidence reveals the following: (1) Mastrangelo had an obvious motive to conceal a plot to kill James Bennett since Bennett was to be the principal witness against Mastrangelo at trial. (2) Mastrangelo's statement to Joseph

Bennett that James Bennett would never take the stand, is evidence of Mastrangelo's intent to prevent James Bennett from testifying, or, at least, of his knowledge that others would prevent James Bennett from testifying. (3) Mastrangelo's statement to Berardi that "it had to be done", considered together with his prior statement to Joseph Bennett that James Bennett would never be allowed to take the stand, is further evidence of Mastrangelo's prior knowledge. It is a strained interpretation that the statement, "it had to be done", merely explained in retrospect, either the reason for or the timing of an act of violence that was completely unanticipated by its principal beneficiary. (4) Even though parts of Berardi's testimony indicate that Mastrangelo may not have learned until after Bennett's killing about the placement of the phone call to which Mastrangelo referred in his statement to Berardi (that a phone call was made and it had to be done), such testimony does not preclude a finding that Mastrangelo had prior knowledge of a plot to kill Bennett.

It is, of course, unnecessary for the Government to prove that Mastrangelo had prior knowledge of all the details which were presumably communicated during the phone call. It is enough to show that Mastrangelo had general knowledge of a plan to murder Bennett. This the Government has done by a preponderance of the credible evidence. Accordingly, I hold that Mastrangelo, through his own misconduct, waived his confrontational objection to the use of James Bennett's grand jury testimony.

(2) *Clear and Convincing Evidence Standard*

[2] The mandate of the Court of Appeals also directed this Court to make findings under the clear and convincing evidence standard. *United States v. Mastrangelo*, 693 F.2d at 273-74. To meet the clear and convincing standard it is not required that the evidence be unequivocal or of such a quality so as to dispel all reasonable

doubt. *Addington v. Texas*, 441 U.S. at 423, 99 S.Ct. at 1807. The clear and convincing standard, however, does require from the fact-finder a distinctly higher degree of certainty than does the preponderance standard. *Id.* at 432-33, 99 S.Ct. at 1812. It has been said that:

> [T]he term "clear and convincing" evidence means that the witnesses to a fact must be found to be credible, and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. Whether evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence.

30 Am.Jur.2d *Evidence* § 1167 (1964); *Hobson v. Eaton*, 399 F.2d 781, 784 n. 2 (6th Cir. 1968), *cert. denied*, 394 U.S. 928, 89 S.Ct. 1189, 22 L.Ed.2d 459 (1969).

Upon examination of all available evidence I find that the Government has failed to establish by clear and convincing evidence Mastrangelo's prior knowledge of a plot to murder James Bennett. The testimony of Joseph Bennett and Nicholas Berardi, although sufficient to support a probability-based finding of Mastrangelo's prior knowledge, lacked the degree of specificity and precision demanded by the clear and convincing standard.

MOTION FOR A NEW TRIAL

[3] At the conclusion of the evidentiary hearing Mastrangelo moved for a new trial pursuant to Fed.R. Cr.P. 33. In support of his motion, Mastrangelo alleges that:

> [T]he recent hearing established that when the government made application for the admission of James Bennett's grand jury testimony, it mislead [sic] the court into believing that Bennett was the only witness who could have connected Mastrangelo to the narcotics conspiracy with which he was charged. In reality, though, the government was aware that Joseph Bennett, James Bennett's nephew, could provide even more direct testimony on this issue. Further, Bennett was bound by a plea agreement with the government that obligated him to testify against Mastrangelo. Nonetheless, the government did not attempt to enforce the terms of that agreement. Rather, it agreed to allow Bennett to make an off the record proffer as to what he knew about Mastrangelo. After making this proffer, Bennett then refused to testify and the government moved for the admission of his uncle's grand jury testimony.

Affidavit of Gerald L. Shargel, at para. 5 (January 13, 1983).

Mastrangelo argues that by withholding knowledge of the existence of Joseph Bennett, the Government deprived the Court of information that was crucial to its February, 1982 decision to admit into evidence, pursuant to Fed.R.Evid. 804(b)(5), the grand jury testimony of the murdered witness James Bennett. *See United States v. Mastrangelo*, 533 F.Supp. 389 (E.D.N.Y.), *remanded*, 693 F.2d 269 (2d Cir. 1982).

Rule 804(b)(5) provides for the admissibility of:

> A statement not specifically covered by any of the foregoing [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable

efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Mastrangelo argues that James Bennett's grand jury testimony should not have been admitted under Rule 804(b)(5) because (1) the testimony of Joseph Bennett would have been more probative on the issue of Mastrangelo's participation in the Jamaica Bay narcotics conspiracy, and (2) such testimony was procurable through reasonable efforts on the part of the Government.

On April 2, 1979, James Bennett testified before a grand jury that he sold Mastrangelo four trucks that were subsequently seized by federal narcotics agents on November 11, 1978 at the Jamaica Bay marina. At the time of the seizure, the trucks were laden with drugs.

James Bennett also identified for the grand jury a tape recording of a February 1, 1979 conversation between Bennett and Mastrangelo. The recorded conversation, made in cooperation with federal agents, contains statements by Mastrangelo to Bennett "which, viewed in print, might reasonably be interpreted as threats intended to deter Bennett from identifying Mastrangelo as the purchaser of the trucks." *United States v. Mastrangelo*, 693 F.2d at 271.

Joseph Bennett, the nephew of James, by comparison, testified at the recent evidentiary hearing on remand that on three occasions Mastrangelo offered him $10,000 to assist in the off-loading of some twenty tons of marijuana which would arrive by ship at a future date. Joseph Bennett testified that he rejected Mastrangelo's offer on each occasion, because he (Joseph) had "jumped bail" and did not wish to become involved. Tr. at pp. 42-46.

Assuming that the testimony given by Joseph Bennett at the recent evidentiary hearing is more probative on the issue of Mastrangelo's guilt than was the grand

jury testimony, which resulted in Mastrangelo's conviction, Rule 804(b)(5)(B) would have allowed the admission of the grand jury testimony only if it could be shown that, at the time of trial, Joseph Bennett's testimony could not be procured by reasonable efforts. The defendant forcefully argued that Joseph Bennett was quite available to testify.

The Government counters that Joseph Bennett's November 16, 1979 plea agreement in no way obligated Bennett to give testimony in the *Mastrangelo* case. Rather, the Government contends, the agreement by its terms required Bennett to testify only in cases unrelated to *Mastrangelo* concerning stolen automobiles, interstate shipment of such vehicles, counterfeit auto titles and stolen caterpillar equipment. *See* Government Exhibit 8; Affirmation of Assistant United States Attorney Susan Shepard, at p. 3 (February 14, 1983).

The Government asserts that, despite its view that Bennett was not obligated to testify under the terms of the 1979 plea agreement, it, nonetheless, made every effort to persuade him to do so. Bennett, however, persisted in his refusal to testify, stating that, if called, he would disavow knowledge of Mastrangelo's involvement in the drug conspiracy and recant his prior testimony in the stolen equipment cases. Affirmation of Assistant United States Attorney William J. Muller, at pp. 5-6 (February 14, 1983).

Given Bennett's testimonial recalcitrance, the Government then persuaded him to make an off the record proffer of what he knew about Mastrangelo on the promise that he would not be forced to testify. *Id.* After Bennett's proffer, the Government again tried to persuade him to take the stand against Mastrangelo voluntarily. *Id.* In view of Bennett's threat to sabotage the Government's case against Mastrangelo, the Government decided not to force the issue through any form of compulsory process. *Id.* at 6-7.

Ultimately, the Government concluded that, despite its reasonable efforts to make Bennett testify, his testimony was "not procurable" within the meaning of Fed.R.Evid. 804(b)(5)(B). *Id.* at 7. The Government then moved under Rule 804(b)(5) to admit into evidence the murdered James Bennett's grand jury testimony. Significantly, the Government failed to apprise the Court of the existence of Joseph Bennett as a possible source of evidence. *Id.* The Court, after finding that the requirements of Rule 804(b)(5) had been met, admitted into evidence the grand jury testimony of James Bennett. *United States v. Mastrangelo*, 533 F.Supp. at 390-391.

Having reviewed Joseph Bennett's November 16, 1979 plea agreement, I agree that Bennett was not obligated by that agreement to give testimony concerning the Jamaica Bay drug conspiracy. This conclusion, however, does not end the inquiry. Mastrangelo argues with considerable force that, as an evidentiary matter, Rule 804(b)(5)(B) obligated the Government to seek a court order compelling Joseph Bennett's testimony prior to seeking admission of James Bennett's grand jury testimony. Mastrangelo's contention frames the following question: Under Rule 804(b)(5)(B) does the Government's obligation to show that Joseph Bennett's testimony was not procurable "through reasonable efforts" require it to demonstrate that Joseph Bennett was "unavailable" as defined by Rule 804(a)(2)?

If the answer is yes, then (assuming Joseph Bennett's live testimony would have been more probative than James Bennett's grand jury testimony) the grand jury testimony was improperly admitted. This is so because "an order of the Court is an essential component in a declaration of unavailability under Rule 804(a)(2)." *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980).

I hold, however, that under the circumstances of this case, the Government's obligation under Rule 804(b)(5)(B) to use reasonable efforts to procure arguably

more probative testimony did not include the requirement of demonstrating Joseph Bennett's unavailability as a witness within the technical definition of Rule 804(a)(2). Accordingly, the Government was not obligated to procure a Court order compelling Joseph Bennett to testify before seeking admission of James Bennett's grand jury testimony. The requirement of a court order before declaring that a recalcitrant witness is unavailable is intended to safeguard the defendant from the hearsay statements of the recalcitrant witness himself. Here it was not the statement of the recalcitrant witness (Joseph Bennett) that was admitted; it was the statement of the deceased witness, James Bennett, that was admitted under Rule 804(b)(5).

On balance, the efforts made by the Government to procure Bennett's testimony were reasonable. *See* Affirmation of Assistant United States Attorney William J. Muller (February 14, 1983). There is nothing inherently unreasonable in eliciting Bennett's off the record proffer by promising him that he would not be forced to testify against Mastrangelo. That decision is within the province of the United States Attorney and not of this Court.

That is not to say, however, that the Government has carte blanche to represent to any potential witness that he will not be called to testify, thereby paving the way for the admission of a deceased witness' grand jury testimony under Rule 804(b)(5). Good faith and right reason must be assumed. Upon careful examination of the record, I find no abusive intent or bad faith on the part of the Government.

I add, however, that the Government exercised extraordinarily poor judgment in failing to apprise the Court of the existence of Joseph Bennett at the time of its application for the admission of James Bennett's grand jury testimony. The Government's unilateral determination that Joseph Bennett's testimony was

not procurable through reasonable efforts usurped the Court's responsibility to administer the rules of evidence fairly through the process of informed decision-making. *See* Fed.R.Evid. 104(a) and (b). Despite the fact that I have now concluded that Joseph Bennett's testimony was not procurable through reasonable effort, I would have preferred to have made that determination prior to trial, and not in the context of a subsequent motion for a new trial.[1]

As an alternative ground for the denial of Mastrangelo's motion for a new trial, it is clear that had Joseph Bennett taken the stand, his anticipated testimony concerning Mastrangelo's three attempts to persuade Bennett to join the narcotics conspiracy would have been anything but exculpatory in nature. Indeed, Mastrangelo finds himself in the curious posture of arguing that under Rule 804(b)(5), the anticipated testimony of Joseph Bennett would have been more probative of his guilt than was the grand jury testimony of James Bennett.

Lastly, I note that Mastrangelo's motion for a new trial is based primarily upon his hearsay objection that James Bennett's grand jury testimony was admitted improperly under Fed.R.Evid. 804(b)(5). The Court of Appeals, in its opinion remanding this case, held that "although Judge Weinstein's finding [that Mastrangelo had prior knowledge of a plot to kill James Bennett] is not dispositive in the present proceeding, it raises an issue as to whether Mastrangelo waived his sixth amendment rights and, *a fortiori*, his hearsay objection."

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[1] I also reject, as unpersuasive, Mastrangelo's separate argument that, because the Government entered the proffer agreement with Joseph Bennett, the "interests of justice" would have been best served by excluding the grand jury testimony of James Bennett. *See* Fed.R. Evid. 804(b)(5)(C). Such an argument is premised upon the assumption that it was unreasonable for the Government to promise Bennett that he would not have to testify. I have found otherwise, however, in the context of evaluating, under Rule 804(b)(5)(B), the reasonableness of the Government's efforts to procure Bennett's testimony.

United States v. Mastrangelo, 693 F.2d at 272. On remand, this Court has found by a preponderance of the evidence, that Mastrangelo indeed waived his sixth amendment rights through his own misconduct. That finding, to paraphrase the language used by the Court of Appeals, leads to the *a fortiori* conclusion that Mastrangelo has also waived the very evidentiary objection upon which he bases his motion for a new trial.

For all the foregoing reasons, then, defendant's motion for an order pursuant to Fed.R.Cr.P. 33 granting him a new trial is denied.

SO ORDERED.

Appendix D
Opinion of United States Court of Appeals
Decided November 15, 1982

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 140, Docket 82-1148

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD MASTRANGELO,
Defendant-Appellant.

Argued Sept. 28, 1982

Decided Nov. 15, 1982

Defendant was convicted in the United States District Court for the Eastern District of New York, Joseph M. McLaughlin, J., of various drug offenses and he appealed. The Court of Appeals, Ralph K. Winter, Circuit Judge, held that an evidentiary hearing was required to determine if defendant was involved in the murder of a prosecution witness, in which case that witness' testimony before a grand jury was admissible at trial.

Remanded.

Oakes, Circuit Judge, filed a concurring opinion.

See also, D.C., 533 F.Supp. 389.

Gerald L. Shargel, New York City
(Judd Burstein, New York City,
of counsel),
for appellant Mastrangelo.

Appendix D - Opinion of United States Court of Appeals Decided November 15, 1982

William J. Muller, Asst. U.S. Atty., E.D. N.Y., Brooklyn, N.Y. (Edward R. Korman, U.S. Atty., E.D.N.Y., Mary McGowan Davis, Asst. U.S. Atty., Brooklyn, N.Y., of counsel), *for appellee United States*

Before FEINBERG, Chief Judge, and OAKES and WINTER, Circuit Judges.

RALPH K. WINTER, *Circuit Judge:*

Richard Mastrangelo appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York, after a jury trial before Judge McLaughlin. Mastrangelo was found guilty of conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846 (1976), possession with intent to distribute marijuana and methaqualone tablets, in violation of 21 U.S.C. § 841(a)(1) (1976), importation of marijuana and methaqualone, in violation of 21 U.S.C. §§ 952(a) and 960 (1976), and obstruction of justice, in violation of 18 U.S.C. § 1503 (1976). Appellant asserts as error the use of the grand jury testimony of a witness who was murdered during the course of his first trial. The decision of the District Court regarding admission of the grand jury testimony is reported at 533 F.Supp. 389 (E.D.N.Y.1982). Mastrangelo claims that such testimony is inadmissible hearsay, the use of which also violates the confrontation clause, U.S. Const. amend. VI.

We remand for an evidentiary hearing as to whether Mastrangelo was involved in the murder of that witness and thereby waived his objection to use of the grand jury testimony.

BACKGROUND

While we assume familiarity with our previous opinion, *United States v. Mastrangelo*, 662 F.2d 946 (2d Cir.1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2236,

72 L.Ed.2d 847 (1982), we briefly set out the facts before us. The government originally charged Mastrangelo and eleven co-defendants with a series of crimes stemming from the importation of 23.4 tons of marijuana and 499,000 methaqualone tablets during 1978. The sole link between Mastrangelo and the drug conspiracy is evidence of his purchase of four trucks which were seized by federal narcotics agents while loaded with the drugs. The sole witness to the purchase of the trucks was one James Bennett. On April 2, 1979, Bennett testified before a grand jury that he sold Mastrangelo the trucks under suspicious circumstances and further identified a tape recording of a February 1, 1979, conversation with Mastrangelo which he, Bennett, made in cooperation with federal agents. During that conversation, Mastrangelo made statements to Bennett which, viewed in print, might reasonably be interpreted as threats intended to deter Bennett from identifying Mastrangelo as the purchaser of the trucks.[1]

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[1] When Bennett protested, "I can't lie to a Grand Jury," the following exchange ensued:

M: No, but you can ... In other words, uh, if they ask, in other words, ah, if they say anything with me, you can't say me. Do you understand?

B: Well, I say, ah, I say I sold you the trucks, right?

M: You can't.

B: Why can't I?

M: You can't say that. Because you didn't sell me the trucks.

B: Well, I actually sold you the trucks.

M: You didn't. You know, Jim? You know what I mean, you really didn't? Otherwise they show you a picture of anybody. Say, say this person did really buy it. They show you pictures. That's not him.

B: Yeah.

M: You know what I mean Jim it's for your own good 'cause 'cause then ah, in other words they're going fuck everything around. I'll get back to you as far as anything ... You didn't say nothing as far as to ah reference to me yet ... did you?

B: No.

Appendix D - Opinion of United States Court of Appeals Decided November 15, 1982

Mastrangelo and a co-defendant Joseph Dazzo were severed from the January, 1981, trial of the ten other defendants due to the unavailability of their counsel. The trial of Mastrangelo and Dazzo began on April 27, 1981. On April 29, on his way to the courthouse to testify, Bennett stepped out of his daughter's Brooklyn home, was chased by two men and was shot dead in the street. The trial judge, Chief Judge Weinstein, declared a mistrial as to Mastrangelo and subsequently denied his motion to bar reprosecution on the basis of the double jeopardy clause, stating,

> I was under the distinct impression, and I believe that by a preponderance of the evidence, based on what I then had before me, I was warranted in finding that this defendant Mastrangelo, either directly arranged for the killing of the witness or was advised of the possible killing of the witness and acquiesced. He was the only person that could gain from it. . . .
>
> The tape was clear that he had threatened another witness. Mastrangelo was out on bail. The Court observed him during this emergency. Everybody in the courtroom was shocked. Mr. Coiro was very upset. The defendant, Mastrangelo, took it like a soldier. He didn't smile, as I recall, but he certainly wasn't upset by it. At best, he was neutral on the issue.
>
> It just is inconceivable . . . that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing this witness, would have been taken without his knowledge, acquiescence, or orders. And that, it seems to me, is the clearest situation of a finding of manifest necessity that you can get.

662 F.2d at 950-51. This Court affirmed the trial court's decision on October 28, 1981, allowing that there was a distinct possibility that Mastrangelo had participated

in Bennett's death and that, given the problems inherent in a delay for a full hearing on the issue of Mastrangelo's complicity, no greater standard of proof was required for purposes of a mistrial. 662 F.2d at 951-52. Mastrangelo's second trial began on February 22, 1982. Prior to trial, the Government moved for the admission of Bennett's grand jury testimony under Fed. R.Evid. 804(b)(5) the residual exception to the hearsay rule.[2] Mastrangelo opposed the motion on the grounds that Rule 804(b)(5) does not permit use of such testimony and that its admission is in any event prohibited by the confrontation clause, citing *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971), *cert. denied*, 410 U.S. 984, 93 S.Ct. 1510, 36 L.Ed.2d 181 (1973). Judge McLaughlin held the testimony admissible because it was surrounded with sufficient " 'particularized guarantees of trustworthiness'," 533 F.Supp. at 390, to overcome the confrontation clause objections, noting as well that, "although this is not dispositive, there is a finding by the prior trial judge that the defendant was implicated in the murder of Bennett, a finding characterized by the Second Circuit as 'understandable'." *Id.*

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[2] Fed.R.Evid. 804(b)(5) states:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

[1] We hold that although Judge Weinstein's finding is not dispositive in the present proceeding, it raises an issue as to whether Mastrangelo waived his sixth amendment rights and, *a fortiori*, his hearsay objection. If Mastrangelo was involved in Bennett's death, his involvement waived his confrontation clause objections to the admission of Bennett's testimony. Because a waiver, if factually supported, will allow us to avoid resolution of the difficult legal and constitutional issues arising under the confrontation clause and Rule 804(b)(5)[3], we remand the case to the District Court for an evidentiary hearing on the question of Mastrangelo's involvement in the murder of Bennett.

[2] The Supreme Court has recognized on several occasions that the right of confrontation may be waived not only by consent, but "at times even by misconduct." *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332-333, 78 L.Ed. 674 (1934); *Diaz v. United States*, 223 U.S. 442, 452-53, 32 S.Ct. 250, 252-253, 56 L.Ed. 500 (1912); *cf. Illinois v. Allen*, 397 U.S. 337, 342-43, 90 S.Ct. 1057, 1060-1061, 25 L.Ed.2d 353 (1970) (disruptive conduct in courtroom); *Reynolds v. United States*, 98 U.S. 145, 159, 25 L.Ed. 244 (1878) (defendant's conduct rendered witness unavailable for trial). As the Court stated in *Diaz*, 223 U.S. at 458, 32 S.Ct. at 255 (quoting with approval *Falk v. United States*, 15 App.D.C. 446, 460,

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[3] Mastrangelo testified in his own defense and conceded the truth of much of Bennett's grand jury testimony. The government argues as a consequence that he has waived his objections. We have previously held, however, that a "defendant's case is prejudiced if he must adjust his defense to refuting testimony improperly admitted. The government cannot use the defendant's rebuttal testimony as grounds for claiming independent vitality for its inadmissible evidence." *United States v. Rosse*, 418 F.2d 38, 42 (2d Cir. 1969), *cert denied*, 397 U.S. 998, 90 S.Ct. 1143, 25 L.Ed.2d 408 (1970). Since the entire course of the trial was affected by the admission of Bennett's testimony in the government's main case, Mastrangelo's decision to testify cannot be a basis for a waiver.

cert. denied, 181 U.S. 618, 21 S.Ct. 923, 45 L.Ed. 1030 (1901)), "Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong." Thus, if a witness' silence is procured by the defendant himself, whether by chicanery, *United States v. Mayes*, 512 F.2d 637, 648-51 (6th Cir.), *cert. denied*, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975), by threats, *United States v. Balano*, 618 F.2d 624, 628-29 (10th Cir. 1979), *cert. denied*, 449 U.S. 840, 101 S.Ct. 118, 66 L.Ed.2d 47 (1980); *United States v. Carlson*, 547 F.2d 1346 (8th Cir.1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977), or by actual violence or murder, *United States v. Thevis*, 665 F.2d 616, 630-31 (5th Cir.), *cert. denied*, ___ U.S. ___ , 103 S.Ct. 57, 74 L.Ed.2d 61 (1982), the defendant cannot then assert his confrontation clause rights in order to prevent prior grand jury testimony of that witness from being admitted against him. Any other result would mock the very system of justice the confrontation clause was designed to protect.

[3] We agree with Mastrangelo, however, that an evidentiary hearing in the absence of the jury is necessary before a finding of waiver may be made. *Thevis, supra; Balano*, 618 F.2d at 629. Chief Judge Weinstein's finding was made without such a hearing and, while Mastrangelo did not request a hearing in that proceeding, he did ask for one on the waiver issue before Judge McLaughlin and thus preserved his rights. Since Mastrangelo's possible waiver of his sixth amendment rights is a preliminary question going to the admissibility of evidence, the hearing will be governed by Fed.R.Evid. 104(a), which states that the exclusionary rules, excepting privileges, do not apply to such proceedings. Thus, hearsay evidence, including Bennett's grand jury testimony, will be admissible, as will all other relevant evidence.

[4] The issue of the burden of proof in the waiver hearing is more difficult. While it is clear that the

government bears the burden, the weight of that burden is in doubt. Other courts have divided on the issue; while *Balano* held that waiver might be shown by a preponderance of the evidence, *Thevis* applied the more stringent "clear and convincing" test. Moreover, the Supreme Court precedents are mixed. While the Court has held the preponderance of evidence test applicable to suppression hearings involving possible misconduct by the government, *Lego v. Twomey*, 404 U.S. 477, 489, 92 S.Ct. 619, 626-627, 30 L.Ed.2d 618 (1972) (voluntariness of confession); *United States v. Matlock*, 415 U.S. 164, 177-78, 94 S.Ct. 988, 996-997, 39 L.Ed.2d 242 (1974) (consent to search), it has applied the clear and convincing standard to questions of admissibility involving constitutional requirements going to the reliability of evidence, *United States v. Wade*, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939, 18 L.Ed.2d 1149 (1967) (circumstances surrounding identification at a showup).

These decisions are thus not dispositive. Since the right of confrontation is closely related to the reliability of testimonial evidence, the clear and convincing test may well apply to issues of admissibility arising under it. However, waiver by misconduct is an issue distinct from the underlying right of confrontation and not necessarily governed by the same rules concerning burden of proof by a preponderance of the evidence where waiver by misconduct is concerned. Such a claim of waiver is not one which is either unusually subject to deception or disfavored by the law. *Compare* McCormick, *McCormick's Handbook on the Law of Evidence* § 340 (2d ed. 1972). To the contrary, such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself.

[5] We therefore remand this case to the District Court for a hearing on the issue of Mastrangelo's participation in Bennett's murder. If the District Court finds that Mastrangelo was in fact involved in the death of Bennett through knowledge, complicity, planning or in any other way, it must hold his objections to the use of Bennett's testimony waived. Bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities is sufficient to constitute a waiver. Although we hold that the standard of proof should be a preponderance of the evidence, we suggest, in order to expedite any further proceedings, that the trial judge make findings under the clear and convincing standard as well. This panel will retain jurisdiction of any further appeal in this case.

Remanded for further proceedings consistent with this opinion.

OAKES, *Circuit Judge* (concurring):

While I agree with most of the majority's opinion as well as its disposition of the case before us, because I remain in doubt as to the appropriate burden of proof in respect to waiver in this case, in prudence I will await the findings of the court below on remand.

Appendix E
Opinion of United States District Court
Dated February 24, 1982

UNITED STATES DISTRICT COURT
E. D. NEW YORK

No. 80 Crim. 285

UNITED STATES OF AMERICA

v.

RICHARD MASTRANGELO

Defendant.

Government applied for pretrial ruling that grand jury testimony and exhibits of deceased witness could be admissible at defendant's trial on conspiracy and drug charges. The District Court, McLaughlin, J., held that grand jury testimony of witness who was murdered hours before he was scheduled to testify at previous trial was admissible at subsequent trial.

Application granted.

Edward R. Korman, U.S. Atty., Brooklyn, N.Y. (William J. Muller, Asst. U.S. Atty., Brooklyn, N.Y., of counsel), *for plaintiff*

Graham Hughes, New York City (Michael Coiro, of counsel, Gerald L. Shargel, New York City, on brief), *for defendant*

MEMORANDUM AND ORDER

McLAUGHLIN, *District Judge.*

This is an application by the Government, pursuant to Federal Rule of Evidence ("F.R.E.") 804(b)(5) and Federal Rules of Criminal Procedure 12 and 57(b), for a pretrial ruling that the Grand Jury testimony and

exhibits of James Bennett will be admissible at the trial of the defendant. The defendant is charged with conspiracy, with importation of and possession with intent to distribute over 23 tons of marijuana and almost half a million methaqualone tablets and with obstruction of Justice. The only evidence linking the defendant to the drug counts is his purchase of four trucks, seized by the Federal agents, which were loaded with the drugs. James Bennett's Grand Jury testimony is necessary to identify the defendant as the purchaser of the trucks.

BACKGROUND

On April 27, 1981, a trial on the drug charges[1] against Mastrangelo and a co-conspirator, Joseph Dazzo, commenced before Chief Judge Weinstein. Two days later, James Bennett, the only witness who could link Mastrangelo to the drugs, was murdered just hours before he was scheduled to testify. Chief Judge Weinstein declared a mistrial as to Mastrangelo.[2]

Mastrangelo moved for dismissal of the indictment on double jeopardy grounds, but Chief Judge Weinstein denied the motion. He found that "by a preponderance of the evidence" Mastrangelo either ordered the killing of Bennett, or knew about it and acquiesced. The Second Circuit affirmed Judge Weinstein's decision on October 28, 1981.[3] *United States v. Mastrangelo*, Dkt. No. 81-1270 (2d Cir. October 28, 1981). 662 F.2d 946. The second jury trial is scheduled to begin on February 22, 1982.

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[1] Ten other co-defendants were tried on January 26, 1981.

[2] The trial against Dazzo continued, culminating in a conviction.

[3] Mastrangelo filed an application for a rehearing *en banc* which was denied by the Second Circuit on December 21, 1981.

Appendix E - Opinion of United States District Court Dated February 24, 1982

DISCUSSION

The Government argues that Bennett's Grand Jury testimony will be admissible under F.R.E. 804(b)(5).[4] It also claims that its admission will not violate the Confrontation Clause of the Sixth Amendment because the testimony is necessary to the Government's case and because it is imbued with overwhelming circumstantial guarantees of trustworthiness. The defendant counters that its admission is flatly prohibited by the Confrontation Clause, as construed in *United Staes v. Fiore*, 443 F.2d 112 (2d Cir. 1971), *cert. denied*, 410 U.S. 984, 93 S.Ct. 1510, 36 L.Ed.2d 181 (1973).

I begin by noting that "[t]he confrontation clause is not merely the equivalent of the hearsay rules." *United States v. Wright*, 588 F.2d 31, 37 (2d Cir. 1978); *see Dutton v. Evans*, 400 U.S. 74, 81-82, 91 S.Ct. 210, 215-216, 27 L.Ed.2d 213 (1970). Nevertheless, recognizing the "truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values' ... and 'stem from the same roots,' " the Supreme Court has sanctioned the use of hearsay in spite of the Confrontation Clause where certain requirements are met. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980), *quoting*, *California v. Green*, 399 U.S. 149, 155, 90 S.Ct. 1930, 1933, 26 L.Ed.2d 489 (1977); *Dutton v. Evans*, 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213 (1970). The rules are summarized succinctly in *Ohio v. Roberts:*

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[4] F.R.E. 804(b)(5) provides for the admissibility of:

> A statement not specifically covered by any of the foregoing [hearsay] exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by the admission of the statement into evidence.

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. at 66, 100 S.Ct. at 2539.

[1,2] In this case, the declarant, James Bennett, is obviously unavailable. Indeed, although this is not dispositive, there is a finding by the prior trial judge that the defendant was implicated in the murder of Bennett, a finding characterized by the Second Circuit as "understandable." *United States v. Mastrangelo*, 662 F.2d 946, at 950 (2d Cir. 1981). Thus, the only question remaining is whether the Government has satisfied the requirement of demonstrating "indicia of reliability" by a "showing of particularized guarantees of trustworthiness."[5] I find that it has.

The Government has demonstrated that Bennett had no motive to testify falsely. He was merely a witness. He was not under investigation as a participant in the crime (*see* Government's Pretrial Memorandum, Exhibit D). He had not been granted immunity (*see* Government's Pretrial Memorandum at 15). He testified under penalty of perjury. He had firsthand knowledge of the events to which he testified. He reaffirmed his statements several times to assistant United States Attorneys and to DEA agents, both before and after he testified. At

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[5] I thus reject defendant's contention that Grand Jury testimony may be admitted without offending the Confrontation Clause only where there is clear and convincing evidence that the defendant has waived his Sixth Amendment rights. Under current constitutional doctrine, no such waiver need be found.

no point did he ever recant his story. *See* Government's Pretrial Memorandum, Exhibits C, D and E. In addition, there are business records which tend to corroborate Bennett's testimony, as well as a tape recording of a conversation between Mastrangelo and Bennett that strongly corroborates Bennett's Grand Jury testimony. There is independent authentication of the voice on the tape as that of Mastrangelo.

Taken together, these factors clearly provide the "particularized guarantees of trustworthiness" required by the Supreme Court. I hold, therefore, that the introduction of Bennett's Grand Jury testimony will not violate the Sixth Amendment.[6] Indeed, this result has been reached by every other circuit faced with this precise problem. *See United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978). *See also United States v. Balano*, 618 F.2d 624 (10th Cir. 1979); *United States v. Garner*, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978); *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976). *See generally* Annotation, Admissi-

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[6] The defendant argues that the Second Circuit case, *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971), *cert denied*, 410 U.S. 984, 93 S.Ct. 1510, 36 L.Ed.2d 181 (1973), is controlling. In *Fiore*, the Second Circuit held that it was error for a trial judge to admit the grand jury testimony of a witness who was available but who refused to testify. The Court ruled that the testimony was not admissible under the then proposed Federal Rules of Evidence and that its admission violated the Confrontation Clause. I find the case distinguishable principally because in *Fiore* there was a serious question about the reliability of the testimony. In effect, the *Fiore* witness was recanting his Grand Jury testimony. Moreover, the *Fiore* case was decided before the *Dutton* case and its progeny had erected the constitutional scaffolding needed to reconcile the demands of the Confrontation Clause with the exceptions to the hearsay rule. The Second Circuit's later decision in *United States v. Medico*, 557 F.2d 309 (2d Cir.), *cert denied*, 434 U.S. 986, 98 S.Ct. 614, 54 L.Ed.2d 480 (1977), more closely reflects the current posture of the Supreme Court on the troubled relationship between the hearsay rule and the Confrontation Clause.

bility of Testimony Before Grand Jury of Unavailable Witness Under Rule 804(b)(5), 50 A.L.R. 848 (1980).

[3] Turning from the constitutional to the evidentiary issues, I believe that the requirement of F.R.E. 804(b)(5) that a statement have "circumstantial guarantees of trustworthiness" has also been satisfied. I find in addition that the other requirements of F.R.E. 804(b)(5) have also been met. The materiality and relevance of the statements identifying Mastrangelo cannot be disputed. The grand jury testimony is offered to link Mastrangelo, as the purchaser of the trucks in which the drugs were found, to the crimes charged in the indictment. *See also* F.R.E. 401. The testimony is more probative on the issue whether Mastrangelo was the purchaser of the trucks involved than any other evidence. Finally, there is no doubt in my mind that the interest of justice will be best served by introduction of Bennett's Grand Jury testimony. *See United States v. West*, 574 F.2d 1131 (4th Cir. 1978).

For all of the above reasons, the Government's application is granted.[7]

SO ORDERED.

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[7] The Government agrees that certain statements in the Grand Jury testimony to the effect that Bennett knew more than he was telling the Grand Jury will be redacted for presentation at trial. Decision on the Government's request to admit the Grand Jury exhibits is reserved until trial.

Appendix F
Opinion of United States Court of Appeals
Decided October 28, 1981

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 257, Docket 81-1270

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD MASTRANGELO,

Appellant.

Argued Sept. 17, 1981

Decided Oct. 28, 1981

In prosecution for conspiracy to import and to possess with intent to distribute substantial quantities of marijuana and other offenses, a mistrial was declared, and trial of defendant and a codefendant was severed. The United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, denied a subsequent motion by defendant to dismiss on ground of double jeopardy, and, on appeal by defendant, the Court of Appeals, Oakes, Circuit Judge, held that in view of trial court's belief that defendant was responsible for murder of witness who was essential to Government's proof of truck transaction, and where codefendant was not aided by the murder, there was "manifest necessity" for mistrial which was thus properly declared without defense motion for same, and such manifest necessity was shown without actual showing of defendant's complicity in death of witness.

Affirmed.

Meskill, Circuit Judge, dissented and filed opinion.

Appendix F - Opinion of United States Court of Appeals Decided October 28, 1981

Gerald Shargel, New York City
(Graham Hughes, New York City,
of counsel),
for appellant

Susan E. Shepard, Asst. U.S. Atty.,
Brooklyn, N.Y. (Edward R. Korman,
U.S. Atty. for the E.D. New York,
Vivian Shevitz, Asst U.S. Atty.,
Brooklyn, N.Y., of counsel),
for appellee

Before OAKES and MESKILL, Circuit Judges, and BLUMENFELD,* District Judge.

OAKES, *Circuit Judge:*

This expedited appeal raises anew the question whether there was "manifest necessity," *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824), for the declaration of a mistrial. What makes this case unique is that the mistrial was declared following the killing of the Government's only witness against appellant, Richard Mastrangelo. The killing occurred on the witness's way to the courtroom to testify in a trial in which the Government's case against the codefendant, Joseph Dazzo, was essentially complete. The United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, denied appellant's motion to dismiss Counts 1, 4, and 5 of the indictment on the ground of double jeopardy. We hold first that appellant had for all practical purposes withdrawn his previous motion for a mistrial on other grounds, so that *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267 (1976), does not apply and we must examine the declaration of the mistrial under the manifest-necessity standard. We hold second, however,

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* Of the District of Connecticut, sitting by designation.

that the court's ordering a mistrial after the witness's murder was proper under that standard, and we accordingly affirm.

FACTS

Appellant Mastrangelo and his codefendant Joseph Dazzo were charged in a superseding indictment, along with three others who were severed before trial, with conspiracy to import and to possess with intent to distribute substantial quantities of marijuana, 21 U.S.C. § 846(1) (Count 1), possession with intent to distribute of approximately 23.4 tons of marijuana (a Schedule I controlled substance) and 499,000 Methaqualone tablets (a Schedule II controlled substance), 21 U.S.C. § 841 (a)(1), 18 U.S.C. § 2 (Count 4), and intentional importation into the United States at Yancarib Enterprises in Queens, New York, aboard the vessel *Terry's Dream*, of the same amounts of marijuana and Methaqualone, 21 U.S.C. §§ 952(a), 960, 18 U.S.C. § 2 (Count 5). Count 6, which was severed before the Mastrangelo-Dazzo trial, charged Mastrangelo with knowingly and corruptly endeavoring to influence the due administration of justice, 18 U.S.C. § 1503.[1]

The Government's evidence at the trial before Judge Weinstein that commenced on April 27, 1981, established the existence of a conspiracy to import boatloads of marijuana into New York from Colombia, South America, between November 10, 1977, and November 11, 1978. On the latter date law enforcement officers in Queens interrupted the offloading of a 75-foot shrimp boat known as *Terry's Dream*, which members of the conspiracy had purchased in Florida in November 1977, and used several times for marijuana importation. At the Yancarib Marina in Queens the officers seized the

[1] Judge Weinstein has ordered the obstruction-of-justice count rejoined for the retrial of appellant. Counts 2 and 3 of the indictment name neither Dazzo nor Mastrangelo and are thus not at issue here.

shrimp boat, a tugboat called the *Bill Mather*, four trucks, three vans, and a Buick sedan. The vessels and vehicles contained a total of 23.4 tons of marijuana and 499,000 Methaqualone tablets. The persons offloading the boat escaped.

At trial, four witnesses connected codefendant Joseph Dazzo to the purchase and repair of the tugboat used to bring the *Terry's Dream* into New York harbor. Frederick Ardolino identified Dazzo as one person who was with him in Virginia to purchase the *Bill Mather* in February 1978. Alfred Jensen, the agent for the seller of the *Bill Mather*, corroborated Ardolino's testimony. James Muller and Kathleen Muller, employees at a family-owned boatyard in Brooklyn, testified about repair work on the *Bill Mather* in April 1978, identifying Dazzo as the person who used the alias "John Ward, Jr.," and directed the repair work.

Important to the sequence of events and to the judge's later ruling on the mistrial was the cross-examination of Ms. Muller on April 29. Dazzo's attorney inquired about a statement she had made to one Haggerty, an investigator employed by Dazzo who had shown her some pictures of people. Asked if she had recognized any of the people, she replied that one of the pictures looked like the person who had identified himself as John Ward. The following colloquy then occurred:

> Q. But you did—Did you also tell Mr. Haggerty that you were not sure—
> A. I had reasons, what I said to Mr. Haggerty, when he was in my office.

On redirect, the Government asked Ms. Muller to explain the circumstances of her conversation with Haggerty. After she explained that Haggerty had said he was an investigator for Dazzo's attorney, the Government asked her the following question:

> Q. You recall on cross-examination you started to say you had reasons for telling Mr. Haggerty what you told him. What were those reasons?

To this, Mastrangelo's counsel, Mr. Coiro, objected, seeking a sidebar conference. The court excused the jury, questioned the witness, and then announced that it would issue the following curative instruction:

> You can say—we can stipulate that she would have answered in words or substance that she did not feel under the circumstances that she wanted to be fully candid with Mr. Haggerty.

Although the Government and Dazzo's attorney agreed to the curative instruction, appellant's counsel, alleging that the questioning implied that the witness had been threatened, moved for a mistrial. Judge Weinstein denied this motion and, after giving the instruction to the jury, again inquired whether it was satisfactory. Counsel for the Government and Dazzo stated that it was, but Mr. Coiro, for Mastrangelo, had no comment.

By the afternoon of April 29, the third day of trial, the case against Dazzo had been substantially completed, and the Government was ready to begin its case against Mastrangelo. The Government originally had hoped to introduce a tape recording made on February 1, 1979, of a conversation between James Bennett and Richard Mastrangelo. Bennett had consented to the taping; this conversation was the subject of the severed sixth count of the indictment for obstruction of justice. The court had, however, in a pretrial ruling, excluded the tape as prejudicial to Dazzo under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and its progeny. James Bennett, who was not implicated in the conspiracy, had worked with his brother at Smitty's Auto & Truck Sales in Brooklyn and had evidently sold to Mastrangelo some of the trucks that were among the vehicles seized at the Yancarib Marina. In its

opening the Government had stated that Mastrangelo had purchased three large moving trucks from Smitty's Auto & Truck Sales in February 1978, paying in cash, and that two of those trucks were seized at the Yancarib Marina, one loaded with marijuana. The Government stated that in September 1978 Mastrangelo paid cash for two more trucks, which were put in the name of Allrite Trucking, a corporation formed by "the organization," and that both of the later-purchased trucks were seized at the Yancarib Marina loaded with marijuana. In the excluded tape-recorded conversation, Mastrangelo, after learning of Bennett's subpoena by a grand jury, tells Bennett to say "[n]othing" in front of the grand jury and "if they ask, in other words, uh, if they say anything with me, you can't say me. Do you understand?" Bennett, apparently not getting the message, replies, "Well, I say, ah, I say I sold you the trucks, right?" And Mastrangelo says, "You can't . . . . You can't say that. Because you didn't sell me the trucks." When Bennett says, "Well, I actually sold you the trucks," Mastrangelo tells him, "You didn't. You know, Jim? You know what I mean you really didn't?" He adds, in what could well be interpreted as a threat, "You know what I mean Jim it's for your own good 'cause 'cause then ah, in other words they're going fuck everything around. I'll get back to you as far as anything. . . ." Later in the conversation, Mastrangelo tells Bennett, "If they show you a picture of anybody, that's not him, that's not him. In other words, they can show you a picture of a million guys, that's not him. That's it. You know what I mean Jim? And that's all you got to say." When Bennett protests, "Well I have to say I sold the trucks"—the Government has seen his book showing the sale of the trucks—Mastrangelo replies, "Don't do that because you know why Jimmy? I could turn around and say no he didn't. There's nothing on paper." Mastrangelo continues, in possibly threatening language, "You know. So let's do it the right way. . . .

This way. Cause they're busting your balls. You got your fucking book. There's my fucking book. What do you want?" Bennett says, "Yeah," and Mastrangelo says, "You know what I mean Jim?" Bennett says, "Uh huh," and Mastrangelo says, "And that's it, case closed."

The court having excluded this evidence because it was prejudicial to Dazzo—evidence that not only incriminated Mastrangelo directly but would be powerful evidence of his consciousness of guilt—it became essential for the Government to call James Bennett himself for proof of the truck transaction. According to the Government's uncontested representation to the trial court, Bennett flew into New York from Florida, where he was living semi-retired, the day before he was to testify. He was at the United States Attorney's office until 10:00 p.m. and was then driven to his daughter's home in Brooklyn. Again according to the Government's uncontested representation, Bennett, on his way to the courthouse on April 29, 1981, "left his daughter's home chased by two men, and [was] shot dead on the street."

Upon so informing the court, the Government first renewed its application to use the tape but the court said, "All I can do is sever Mr. Dazzo and Mr. Mastrangelo and start all over again." The court, aware of the double jeopardy problem, asked counsel for Mastrangelo "whether you make a motion for a mistrial, and renew your motion for a severance?" Counsel asked for time to consider that. A second application by the Government was that Mastrangelo's bail be increased to $500,000. The court said that as to Dazzo it saw no reason why "we could not go ahead," but revoked Mastrangelo's bail and then called in the marshals to arrest Mastrangelo and take him into custody. The court made arrangements to sequester the jury and ordered jurors not to communicate with anyone. Additionally, the court asked the Government to arrange to have protective custody for the Mullers, who testified earlier that day.

At this point the court informed Mastrangelo's counsel that "[y]ou have already moved for a mistrial and I am considering the granting of that motion. That has not been withdrawn. . . . I denied the motion [earlier], but I am reconsidering it and I am reserving decision." Judge Weinstein again noted his unwillingness to rejoin the obstruction count or play the tape, for fear of tainting the jury in connection with the "clean case against Dazzo." Further discussion indicated that the case against Dazzo would be closed with a few formalities. The court gave Mastrangelo's counsel more time to make known his position, and after consultation counsel stated on the record that "the defendant Mastrangelo's position is that we are not moving for a mistrial. . . . At the present time . . . there is no motion on behalf of the defendant Mastrangelo before the Court at this time." The court, however, then granted the defendant Mastrangelo's previous motion for a mistrial and severance (based on Ms. Muller's testimony), but added that "[i]f that motion had not been made by the defendant, I would have granted it on my own motion in view of these circumstances. If I had not granted it on my own motion, I would have granted it on the government's motion." Mastrangelo's counsel stated for the record that "at this time I am not renewing that motion [for a mistrial]." The judge ordered that the portion of the transcript containing a reference to the Mullers' address be sealed, and the trial against Dazzo proceeded, culminating in his conviction.

DISCUSSION

[1] The Government argues that Mastrangelo did not withdraw his motion for a mistrial before it was granted and that accordingly under *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081, 47 L.Ed.2d 267 (1976), any claim of double jeopardy is unavailable. We agree with appellant, however, that for all practical purposes, though not in so many words, the motion for a mistrial based upon Ms. Muller's testimony was with-

drawn. Before the court granted the motion, defense counsel stated on the record, "After consultation, Judge, the defendant Mastrangelo's position is that we are not moving for a mistrial . . . At the present time, in light of the unfortunate situation that has happened, there is no motion on behalf of the defendant Mastrangelo before the Court at this time." This case is similar to *United States v. Evers*, 569 F.2d 876, 878 (5th Cir. 1978), in which defense counsel had moved for a mistrial but then "advised the court that because defendant was anxious not to retry the case, and because he did not think the evidence sufficient for the case to go to the jury, he would withdraw his motion for a mistrial." This in effect was what defense counsel did here, and therefore the question must turn on "manifest necessity."

[2] In this connection the arguments below on Mastrangelo's double-jeopardy motion shed further light on the trial court's decision, though we realize that under *Arizona v. Washington*, 434 U.S. 497, 516-17, 98 S.Ct. 824, 836, 54 L.Ed.2d 717 (1978), the record speaks for itself in connection with manifest necessity and the trial court's mistrial ruling is entitled to great deference irrespective of any statement of reasons by the trial court. *See United States v. Grasso*, 600 F.2d 342, 343 (2d Cir. 1979) (recognizing that the court's previous holding in *United States v. Grasso*, 552 F.2d 46 (2d Cir. 1977), that findings by the trial court were necessary had been "plainly overruled by the Supreme Court" in *Arizona v. Washington).*

The arguments below on the motion now appealed from demonstrate that the district court's underlying reason for declaring a mistrial was that the judge quite understandably believed that Mastrangelo was responsible for Bennett's death. That the court, immediately after being informed of Bennett's death, (a) sequestered the jury, (b) revoked Mastrangelo's bail, (c) ordered protective custody for the Mullers, and (d) sealed the portion of the transcript containing the Mullers'

address, confirms this, though it was not made explicit at that time. As the court below stated at argument,

> I was under the distinct impression, and I believe that by a preponderance of the evidence, based on what I then had before me, I was warranted in finding that this defendant, Mastrangelo, either directly arranged for the killing of the witness or was advised of the possible killing of the witness and acquiesced. He was the only person that could gain from it.
>
> Dazzo couldn't gain from it at all. He was, by that time, destroyed by the government's case. . . .
>
> There was evidence before the Court that this very defendant, Mastrangelo, had threatened other witnesses, in fact, he had been indicted and I severed that count.
>
> The tape was clear that he had threatened another witness. Mastrangelo was out on bail. The Court observed him during this emergency. Everybody in this courtroom was shocked. Mr. Coiro was very upset. The defendant, Mastrangelo, took it like a soldier. He didn't smile, as I recall, but he certainly wasn't upset by it. At best, he was neutral on the issue.
>
> It just is inconceivable . . . that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing this witness, would have been taken without his knowledge, acquiescence, or orders. And that, it seems to me, is the clearest situation of a finding of manifest necessity that you can get.

[3] Appellant agrees, as he must, that if he had in fact killed or arranged for the killing of the witness Bennett, the court could make a finding of manifest

necessity for the declaration of a mistrial.[2] He argues, however, that because there was no hearing on this question, no evidence presented other than the Government's representation about what had occurred, and the possibility that Bennett might have been killed by others for other reasons, the court could not assume that appellant was responsible. The purport of this argument is that without an actual showing of the defendant's complicity in the death of the witness, the court could not make a finding of manifest necessity.

---

[2] The defendant's responsibility for reviving the *Bruton* problem would clearly distinguish the case from *United States v. Glover*, 506 F.2d 291 (2d Cir. 1974). In *Glover* the prosecution waited until the fifth day of a joint trial to notify the court that it intended to introduce statements by Glover that presented a *Bruton* problem with respect to the other defendants. The trial court granted the Government's motion for a mistrial and severance as to Glover and we held that he could not be retried. Insofar as the mistrial was granted for the benefit of the codefendants and the Government, and "Glover had done nothing to bring about the *contretemps* that resulted in the declaration of a mistrial," 506 F.2d at 297-98, there was not a manifest necessity for ordering the mistrial. If the defendant creates the need for the mistrial and severance, as by killing a witness and necessitating the use of substitute evidence that is inadmissible in a joint trial, *Glover* does not bar his retrial.

Apart from appellant's possible involvement in the murder, this case differs from *Glover* in that the prosecution in *Glover* failed to seek a pretrial ruling on the *Bruton* evidence, whereas here the prosecution sought such a ruling and was willing to forego the use of the tape in the joint trial because it assumed Bennett would testify. We need express no opinion on whether the prosecution's freedom from fault, absent reason to suspect the defendant was responsible for the witness's unavailability, would alone suffice to make *Glover* inapplicable and sustain a finding of manifest necessity for a mistrial and severance. *Dunkerley v. Hogan*, 579 F.2d 141 (2d Cir. 1978), we find distinguishable because there a continuance was a viable alternative. Here the only "viable alternative" suggested was a reversal of the trial court's ruling excluding the Bennett-Mastrangelo tape-recorded conversation, coupled with a redaction of the threats in that conversation. We do not believe that to be an "feasible and practical [a] solution to the problem," *id.* at 147, as was the alternative of a continuance in *Dunkerley*. *See* text, *infra*.

We disagree. It would ordinarily be impossible to make an investigation, have a hearing, and permit the introduction of evidence and cross-examination, with some resultant finding based upon whatever standard of proof might be appropriate, *see, e.g., Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (upholding the use of the preponderance-of-evidence standard as the burden of proof in a suppression hearing re the voluntariness of a confession), meanwhile suspending the trial in question. It is simply impracticable in the situation of the killing of a key witness to reach any well-founded determination about the true course of events in an hour, a day, a week, or even a month.

The test, therefore, is not whether the defendant was in fact involved in the witness's death, nor even whether under a preponderance of the evidence or some lesser evidentiary standard the court finds it probable that the defendant has participated in the murder. To make such a determination would require a delay in the trial of weeks or even months that would itself ultimately require a mistrial: the jurors' minds would no longer be fresh and, even worse, the reasons for the delay might have become evident to one or more of them. Rather, the test must be simply whether at the time the trial judge is faced with the question he reasonably concludes that there is a distinct possibility that the defendant participated in making the witness unavailable, at least where, as here, the Government is totally without fault and the case cannot proceed and the ends of justice be served by the evidence already introduced or otherwise available to the Government. Although the defendant has an important interest in concluding his or her confrontation with society, *United States v. Jorn*, 400 U.S. 470, 486, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971), the courts are also charged with protecting "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. at 509, 98 S.Ct. at 832. *See Wade*

v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949) (the court should weigh the defendant's "valued right to have his trial completed by a particular tribunal" against the public's interest in "fair trials designed to end in just judgments"). We must not only give due deference to the trial judge's determination, *see Arizona v. Washington; United States v. Grasso*, 600 F.2d at 347, but that determination in favor of the declaration of a mistrial in a case like this—"along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny"—"is entitled to special respect." *Arizona v. Washington*, 434 U.S. at 510, 98 S.Ct. at 833.

We note also that the court here carefully explored and rejected alternatives to a mistrial. The most likely alternative was for the court to reverse its prior decision on the admissibility of the tape-recorded conversation and, using a curative instruction, to attempt to avoid unfairly prejudicing the codefendant, Dazzo. It is always difficult, and sometimes impossible, for a court of appeals, reviewing a cold record of printed words, to measure the likely prejudicial effect of a given piece of evidence in a given trial. The district court's evaluation of events occurring before the jury is, as we said in *Grasso*, 600 F.2d at 343, "to be accorded the highest deference." *See also Arizona v. Washington*, 434 U.S. at 513-14, 98 S.Ct. at 834. As Judge Weinstein observed at the hearing on the double-jeopardy motion below, the court of appeals did not feel "the atmosphere of this courtroom when the jury was dismissed and that the witnesses were obviously under great tension. [It] didn't see the hesitation of these witnesses as they testified." Nor could we observe the effect upon the jury of Ms. Muller's testimony, in response to questioning by Dazzo's attorney, that she "had reasons, what I said to Mr. Haggerty, when he was in my office." We do know that when the Government on redirect asked what those reasons were, Mastrangelo's counsel not only objected

but requested a mistrial; the court was very careful to exclude those statements and seek to have the parties stipulate what her answer would have been, namely, that "she did not feel under the circumstances that she wanted to be fully candid with Mr. Haggerty."

Had we been presented with this situation, we might, instead of declaring a mistrial, have reversed our decision not to admit into evidence the taped conversation bearing Mastrangelo's incriminating statements, which after all did not mention Dazzo. But the tape did contain what could be interpreted as a direct threat and, perhaps, a veiled threat against a witness who would not testify. Moreover, with the Government's case against Dazzo essentially completed—a case the judge thought was a "clean" one—we think the judge could properly take into account the public's interest in ensuring that there was neither a mistrial as to Dazzo nor grounds for a retrial at which witnesses who had testified might not be available or willing to testify against him. Acting in an emergency with the Government free from fault, with a distinct possibility that the defendant Mastrangelo was responsible for the killing of the one witness against him, and duly concerned by the threat of prejudice to the codefendant Dazzo (and, indirectly, to the Government's case against Dazzo) from the admission of the tape with a resultant possible mistrial or new trial as to him, we think the trial judge acted well within the wide discretion afforded him by the double jeopardy cases. We accordingly defer to his judgment about the events occurring before the jury and to his observation of the witnesses, the parties, and the jury itself. To hold otherwise would invade the province of the trial judge for the sake of abstract formality.

Judgment affirmed.

MESKILL, *Circuit Judge* (dissenting):

The majority reduces the Double Jeopardy Clause of the Fifth Amendment to an "abstract formality" that

must yield when a trial judge "reasonably concludes that there is a distinct possibility" that a defendant was responsible for the disappearance of government evidence. Because I believe the Double Jeopardy Clause is not so fragile, I dissent.

This is the type of case which evokes the statement "hard cases make bad law." The majority implicitly recognizes that the record cannot support a finding that appellant Mastrangelo was involved in Bennett's killing "under a preponderance of the evidence or some lesser evidentiary standard[,]" but concludes that no such showing is required. The majority cites no authority, and none exists, for its rule that the Double Jeopardy Clause falls to the trial court's reasonable conclusion that there is a distinct possibility that the defendant participated in the disappearance of government evidence. Instead, my brothers rely on statements in *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), and *United States v. Grasso*, 600 F.2d 342 (2d Cir. 1979), to the effect that an appellate court must accord substantial deference to a trial court's judgment on manifest necessity. I accept these statements but not the conclusion that they support an affirmance here.

I fully agree that "[a] great deal of discretion must . . . be vested in the trial judge, who is usually best situated to determine the degree of necessity for the declaration of a mistrial when an unexpected event occurs during a trial." *Dunkerley v. Hogan*, 579 F.2d 141, 145 (2d Cir. 1978). "This, however, does not end the inquiry . . . . We must satisfy ourselves that the trial court exercised 'sound discretion.' " *United States v. Grasso*, 600 F.2d at 344 (quoting *Arizona v. Washington*, 434 U.S. at 514, 98 S.Ct. at 835). *See also Dunkerley v. Hogan*, 579 F.2d at 145-48 (holding that the trial judge did not exercise "sound discretion"). *Arizona* taught us that the "strictest scrutiny is appropriate when the

basis for the mistrial is the unavailability of critical prosecution evidence . . . ." 434 U.S. at 508, 98 S.Ct. at 832 Moreover,

> in view of the importance of the [defendant's right to have the trial concluded by a particular tribunal], and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.
>
> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. . . . Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.

Id. at 505-06, 98 S.Ct. at 830-31 (footnotes omitted).

The majority, in permitting the protections of the Fifth Amendment to be defeated by a reasonable conclusion that there is a "distinct possibility" that the defendant was somehow connected with the disappearance of government evidence, ignores the "heavy burden" and "high degree" standards enunciated in *Arizona*. The crux of the majority opinion is that it would be "impracticable in the situation of the killing of a key witness to reach any well-founded determination about the true course of events . . . ." It may well be impracticable to make such a determination, but I cannot accept the conclusion in this case that impracticability justifies relieving the government of its "heavy

burden" to show that the denial of an important constitutional protection is highly necessary.

The majority is properly concerned with "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. at 509, 98 S.Ct. at 832. It has long been the rule that the trial court should weigh the defendant's "valued right to have his trial completed by a particular tribunal" against society's interest in "fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949). But in *United States v. Glover*, 506 F.2d 291 (2d Cir. 1974), this Court weighed similar facts and concluded that the Double Jeopardy Clause barred reprosecution. The majority's tortured analysis of the standard of proof for finding that Mastrangelo was involved in the killing of a witness is designed to distinguish this case from *Glover*.

Like the instant case, *Glover* involved the declaration of a mistrial in a multidefendant trial. Glover was tried jointly with three codefendants for conspiracy to violate the federal narcotics laws. After almost five days of trial, the government informed the court that it intended to introduce evidence of admissions by Glover. The judge immediately recognized that this evidence might not be admissible against Glover's codefendants and asked all parties to brief and argue the issue. After considering the arguments, the judge ruled that *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and its progeny prohibited introduction of the proffered evidence against Glover's codefendants. He then granted the government's motion for severance of Glover and declared a mistrial as to Glover.

Glover moved to dismiss the indictment on the ground that a subsequent trial would violate his right to protection against double jeopardy. The trial court denied this motion and Glover was tried and convicted.

On appeal, this Court held that Glover's motion to dismiss should have been granted because the declaration of a mistrial as to him was not supported by manifest necessity. "The rationale of *Glover* was that retrial violated the Double Jeopardy Clause because it did not provide the involuntarily severed defendant with any advantage, but merely helped his codefendants and the Government." *United States v. Figueroa*, 618 F.2d 934, 944-45 n.6 (2d Cir. 1980).

It cannot seriously be contended that the declaration of a mistrial in the instant case was for the benefit of Mastrangelo. The government concedes that had the trial continued without introduction of the tape, it would have been unable to present even a *prima facie* case against Mastrangelo. As in *Glover*, the trial court here declared a mistrial to protect a codefendant from prejudice without diminishing the government's chances of obtaining a conviction against the severed defendant. *Glover* controls the instant case and requires reversal of the trial court's finding of manifest necessity.

Had the trial court lacked reasonable alternatives to declaring a mistrial, I would agree that manifest necessity existed and that *Glover* would not control.[1] But this

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[1] In addition to distinguishing *Glover* on the ground that Mastrangelo can be held responsible for Bennett's death, the majority suggests that *Glover* might also be distinguished because the government could easily have avoided the mistrial in that case by acting more carefully. The majority implies that it is an open question whether the absence of prosecutorial misconduct or error will vitiate a double jeopardy claim when a mistrial was declared over the defendant's objection, even when the defendant did not cause the problem that precipitated the mistrial.

In *Dunkerley v. Hogan*, 579 F.2d 141 (2d Cir. 1978), this Court held that the Double Jeopardy Clause barred retrial of a defendant following the declaration of a mistrial prompted by the hospitalization of the defendant with a partially collapsed lung. This Court ruled that the mistrial was not supported by manifest necessity because a continuance could have been granted for the 7 to 10 days

(Footnote continued on following page.)

was not the case. The trial court could have reversed its ruling on the admissibility of the taped conversation between Mastrangelo and Bennett, protecting against prejudice to Dazzo either by redacting the allegedly threatening portions of the conversation or by giving a curative instruction to the jury. The majority recognizes this as a reasonable alternative and even suggests that it would have preferred this option. Once again, however, the majority retreats behind the statement that the trial court's decision must be accorded "the highest deference." In doing so, the majority ignores the fact that "the basis for the mistrial [was] the unavailability of critical prosecution evidence . . . ." *Arizona v. Washington*, 434 U.S. at 508, 98 S.Ct. at 832. Thus, in evaluating the trial court's exercise of discretion, "the strictest scrutiny is appropriate . . . ." *Id.* The majority's search for reasons to affirm the trial court's ruling is plainly inconsistent with the strict scrutiny that *Arizona* prescribes.

The fact that the case against Dazzo was strong and essentially complete should not diminish Mastrangelo's right to have his trial concluded before his first jury when it is not even arguable that the mistrial was for his benefit and when there is no reasonable basis for concluding that he caused the government's evidence to disappear.

I believe that when viable alternatives to declaring the mistrial are available, and when the mistrial is neither for the defendant's benefit nor demonstrably caused by the defendant, a court should be slow to reject

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(Footnote continued from preceding page.)
during which the defendant was expected to be hospitalized. There was no suggestion that either the defendant or the government was in any way responsible for creating the need for the mistrial.

Therefore, where viable alternatives are available, the absence of prosecutorial misconduct or error should not alone defeat a subsequent double jeopardy claim.

the protections of the Double Jeopardy Clause. This is especially true when the court is confronted with the conflicting interests of codefendants. As Judge Gurfein wrote for this Court in *Glover:*

> a permissive attitude toward mistrials in multiple defendant conspiracy cases could lead to an erosion, bit by bit, of the double jeopardy provision—an undesirable result . . . .

506 F.2d at 298. I believe that the majority opinion is a substantial step in that erosion.

Office - Supreme Court, U.S.
FILED
MAY 4 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1365

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD MASTRANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived his objections to admission of the grand jury testimony of a government witness who was murdered before he could testify at trial, where the trial court found by a preponderance of the evidence that petitioner knew of the murder plot against the witness and failed to report it to the authorities.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals are reported at 722 F.2d 13 (Pet. App. 1a-2a), 693 F.2d 269 (Pet. App. 26a-34a), and 662 F.2d 946 (Pet. App. 41a-60a). The opinions of the district court are reported at 561 F. Supp. 1114 (Pet. App. 5a-25a) and 533 F. Supp. 389 (Pet. App. 35a-40a).

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1983. A petition for rehearing was denied on December 19, 1983. The petition for a writ of certiorari was filed on February 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1981 petitioner was indicted by a federal grand jury in the United States District Court for the Eastern District of New York for conspiring to import marijuana and to possess it with intent to distribute, in violation

of 21 U.S.C. 846; possessing marijuana and methaqualone with intent to distribute, in violation of 21 U.S.C. 841(a)(1); importing marijuana and methaqualone, in violation of 21 U.S.C. 952(a) and 960; and obstructing justice, in violation of 18 U.S.C. 1503. The sole link between petitioner and the drug conspiracy was evidence that petitioner had purchased four trucks that were seized by DEA agents and found to be loaded with drugs.[1] The only witness to the purchase of the trucks was James Bennett, who testified before the grand jury that he had sold the trucks to petitioner under suspicious circumstances. Bennett also identified for the grand jury a tape recording of a conversation he had had with petitioner. During the conversation, petitioner threatened Bennett in order to deter him from identifying petitioner as the purchaser of the trucks.[2]

On the third day of petitioner's joint trial with co-defendant Joseph Dazzo, Bennett was shot dead by two men as he left his daughter's home to go to the courthouse to testify. After petitioner had first moved for a mistrial and then withdrawn his motion (Pet. App. 48a-49a), the trial judge declared a mistrial as to petitioner and subsequently denied his motion to bar reprosecution on double jeopardy grounds. The court stated (Pet. App. 29a):

> It just is inconceivable . . . that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing the witness, would have been

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[1]The seizure of the trucks occurred after federal agents had interrupted the unloading of a 75-foot shrimp boat known as "Terry's Dream," which members of the conspiracy had purchased in Florida in November 1977. In addition to the trucks and shrimp boat, the agents seized a tugboat, three vans and an automobile — which together contained 23.4 tons of marijuana and 499,000 methaqualone tablets (Pet. App. 43a-44a).

[2]The pertinent portion of the tape-recorded conversation is set forth at Pet. App. 28a n.1.

> taken without his knowledge, acquiescence, or orders. And that, it seems to me, is the clearest situation of a finding of manifest necessity that you can get.

The court of appeals affirmed the denial of petitioner's motion to bar reprosecution (Pet. App. 41a-60a), observing that there was a "distinct possibility" that petitioner had participated in Bennett's death (Pet. App. 54a).

2. Prior to petitioner's retrial before a jury,[3] the government moved for the admission of Bennett's grand jury testimony under Fed. R. Evid. 804(b)(5), the exception to the hearsay rule for statements by an unavailable witness where the statements are not admissible under another exception, but have circumstantial guarantees of trustworthiness. Petitioner opposed the motion on the grounds that Rule 804(b)(5) does not permit use of such testimony and that its admission was prohibited by the Confrontation Clause. The district court held the testimony admissible, finding that it had " 'particularized guarantees of trustworthiness' " sufficient to overcome the Confrontation Clause objections (Pet. App. 39a) and noting that in any event "there is a finding by the prior trial judge that the defendant was implicated in the murder of Bennett, a finding characterized by the Second Circuit as 'understandable' " (Pet. App. 38a, quoting Pet. App. 49a). Thereafter, petitioner was convicted on all counts. He was sentenced to a total of nine years' imprisonment, to be followed by a special parole term of ten years, and fined $20,000.

Petitioner appealed. In order to "avoid resolution of the difficult legal and constitutional issues arising under the confrontation clause and Rule 804(b)" (Pet. App. 31a), the court of appeals remanded for an evidentiary hearing to

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[3]The obstruction of justice count against petitioner, which had been severed from the first trial, was rejoined for the second trial.

determine whether petitioner had been involved in Bennett's murder and had thereby waived his objection to use of Bennett's grand jury testimony (Pet. App. 26a-34a). The court stated (Pet. App. 34a) that "[i]f the District Court finds that [petitioner] was in fact involved in the death of Bennett through knowledge, complicity, planning or in any other way, it must hold his objections to the use of Bennett's testimony waived. Bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities is sufficient to constitute a waiver." The court further stated (*ibid.*) that the "standard of proof [on remand] should be a preponderance of the evidence" — although it suggested that the district court make findings under the "clear and convincing" standard as well in order to expedite any further proceedings.

3. After the hearing on remand, the district court held that the government had established "by a preponderance of credible evidence that [petitioner] had prior knowledge of a plot to murder James Bennett and failed to warn the appropriate authorities" (Pet. App. 7a). In particular, the court relied on (1) petitioner's obvious motive to conceal the plot to kill Bennett, (2) petitioner's statement to the murder victim's nephew that Bennett would never take the stand, and (3) petitioner's statement to a cellmate after the murder that the murder "had to be done" (Pet. App. 16a-17a). However, the court determined that the government had not established petitioner's prior knowledge of the murder plot by "clear and convincing" evidence (Pet. App. 17a-18a).

On appeal, petitioner asked the court to reject its previous decision that prior knowledge together with a failure to warn appropriate authorities is sufficient to constitute waiver of the right of confrontation, and that such waiver may be established by a preponderance of the evidence. The court declined this invitation and affirmed the judgment (Pet. App. 1a-2a).

ARGUMENT

Petitioner contends that the courts below erred in holding that he waived his objection under the Confrontation Clause to admission of James Bennett's grand jury testimony. First, he argues (Pet. 12-16) that his prior knowledge of the plot to murder Bennett, coupled with his failure to warn the appropriate authorities, did not amount to a waiver of his right of confrontation. Second, he argues (Pet. 16-30) that the "clear and convincing evidence" standard rather than the "preponderance of the evidence" standard should have been employed in determining whether he waived that right. These claims are without merit.

1. The courts below correctly held that petitioner's failure to notify the authorities about the plot to kill Bennett constituted a waiver of his right of confrontation. It is well settled that the right of confrontation is not absolute and must give way at times to stronger state interests. See *Taylor* v. *United States*, 414 U.S. 17 (1973); *Illinois* v. *Allen*, 397 U.S. 337 (1970). Employing either a concept of implicit waiver or the principle that a person should not profit by his own wrong, courts have repeatedly relaxed the right of confrontation where the defendant wrongfully caused the witness's unavailability. See, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145 (1878); *Steele* v. *Taylor*, 684 F.2d 1193, 1200-1204 (6th Cir. 1982), cert. denied, No. 82-6109 (Mar. 28, 1983); *United States* v. *Thevis*, 665 F.2d 616, 630-633 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Balano*, 618 F.2d 624, 628-630 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); *United States* v. *Carlson*, 547 F.2d 1346, 1355-1360 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977). The general theory of these cases is that the "disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act." *Steele* v. *Taylor*, 684

F.2d at 1201. While such wrongful conduct obviously includes the use of force and threats, it also has been held to include "persuasion and control by a defendant, *the wrongful nondisclosure of information,* and a defendant's direction to a witness to exercise the Fifth Amendment privilege." *Ibid.* (emphasis added).

Petitioner argues (Pet. 14-15) that his failure to notify the authorities of the murder plot did not constitute a waiver of his confrontation rights because he had no legal duty to make such notification. But this argument misses the point. The basis for the finding of a waiver is not the violation of a legal duty. In *Reynolds* v. *United States, supra,* for example, this Court found a waiver based on the defendant's mere refusal to disclose the witness's whereabouts to a process server. The waiver doctrine rests "on a principle of reciprocity similar to the equitable doctrine of 'clean hands.' " *Steele* v. *Taylor,* 684 F.2d at 1202. Thus, the waiver may be based on wrongful conduct falling short of violation of a legal duty.

This seems an especially clear case. A defendant simply should not be permitted to benefit from the murder of a government witness when he was in a position to prevent the murder by notifying the authorities, but failed to do so. An opposite rule " 'would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause,' * * * and [would] make a mockery of the system of justice that the right was designed to protect." *United States* v. *Thevis,* 665 F.2d at 630 (quoting *United States* v. *Carlson,* 547 F.2d at 1359).[4]

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[4]In each of the cases cited by petitioner (Pet. 13) the court determined that the defendant had waived his right of confrontation. Petitioner cites no decision holding that there can be no waiver absent violation of a legal duty.

2. In arguing that the courts below should have employed the "clear and convincing" evidentiary standard rather than the "preponderance of the evidence" standard in determining whether he waived his right of confrontation, petitioner relies on *United States* v. *Thevis, supra.* To be sure, the court of appeals in *Thevis* stated in dictum[5] that a finding of waiver in this context can be supported only by clear and convincing evidence that the defendant is responsible for the witness's unavailability. *Id.* at 630-631. The court explained that "[w]here reliability of evidence is a primary concern, the Supreme Court has conditioned admissibility on the 'clear and convincing' standard." *Id.* at 631. But the court in *Thevis* obviously misperceived the issue; the question there, as well as here, was not whether the unavailable witness's grand jury testimony was reliable, but whether the defendant, by his conduct, waived his right of confrontation. That question is totally unrelated to issues of reliability. As the court below correctly reasoned (Pet. App. 33a):

> Since the right of confrontation is closely related to the reliability of testimonial evidence, the clear and convincing test may well apply to issues of admissibility arising under it. However, waiver by misconduct is an issue distinct from the underlying right of confrontation and not necessarily governed by the same rules concerning burden of proof * * *.

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[5]In *Thevis*, the district court admitted the challenged evidence on a finding by clear and convincing evidence that the defendant was responsible for the witness's death (665 F.2d at 627). On appeal, the defendant argued that the court should have applied the "reasonable doubt" standard. The court of appeals rejected that argument. The court also rejected the government's argument that a "preponderance of the evidence" standard was sufficient, but that conclusion was plainly unnecessary to decision of the case and is therefore obiter dictum. See *id.* at 630-631.

With respect to the question of waiver, "[a] standard that requires the proponent to show that it is more probable than not that the defendant procured the unavailability of the witness is constitutionally sufficient under the due process and confrontation clauses." *Steele* v. *Taylor*, 684 F.2d at 1202. Accord, *United States* v. *Balano*, 618 F.2d at 629.[6] As the court below correctly concluded (Pet. App. 33a), the more demanding "clear and convincing" evidentiary standard would be inappropriate because

> [s]uch a claim of waiver is not one which is either unusually subject to deception or disfavored by the law. * * * To the contrary, such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself.

We do not believe that the conflict between the *Thevis* dictum and the decisions of the other courts of appeals that have addressed this issue warrants Supreme Court review. Not only is the majority view, adopted by the Second Circuit below, clearly more persuasive, but we doubt that the

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[6] In resolving the admissibility of extrajudicial statements under the co-conspirator exception to the hearsay rule, the courts of appeals generally apply the "preponderance of the evidence" standard. See, *e.g.*, *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978). And as the court stated in *Steele* v. *Taylor*, 684 F.2d at 1203 (citations deleted), "[s]ince the question of admissibility of * * * statements under the co-conspirator exception is equivalent to a ruling on their admissibility under the confrontation clause, we see no logical reason to impose a higher standard * * * in connection with rulings on the admissibility of similar extra-judicial statements [under a waiver theory]."

difference in the standards would affect the ultimate outcome of the waiver question in many cases.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

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[7]This case is highly unusual on its facts, as petitioner's extended discussion of those facts demonstrates (Pet. 5-11, 19-29). The district court's determination that petitioner's knowledge of the murder was established under one standard, but not the other, may well prove to be unique.